(2) that both the Tax Injunction Act; and (3) the Eleventh Amendment barred their suit; and (4) that the Tribe was an indispensable party without whom the suit could not proceed. *Wilbur*, 423 F.3d at 1105. The Governor filed a motion for a protective order asking the District Court to stay the taking of the deposition of Martin Loesch, an attorney for the Tribe. *Petition Appendix C.* Because the Tribe had refused to supply the Wilburs with a copy of the proposed contract, Loesch was directed by subpoena duces tecum to bring a copy of it to his deposition.

The Tribe filed a brief in the District Court supporting the Governor's motion for a protective order. *Petition Appendix D.* The Tribe represented to the District Court: "Although the Tribe is not a party to this action, the Tribe has an interest in the Motion for Protective Order," because the deponent was one of its attorneys. *Petition Appendix* at D-1. In its brief the Tribe stated:

> Although the Tribe has not gone to the expense of independently seeking a protective order from this Court, it fully supports Defendants' Motion for a Protective Order.

Id. at D-2. In addition, the Tribe pointed out that the Wilburs could not sue the Tribe without the Tribe's consent. *Id.* at D-2.

Finally, the Tribe advised the Court that it fully supported the Governor's contentions that the Wilburs' suit should be dismissed:

> The Tribe is clearly an indispensable party in an action that seeks to bar an agreement to which the Tribe is a party. Furthermore, Plaintiffs lack standing because they are not injured in fact by the proposed Tribal-State agreement.

Id. at D-3. Thus, the Tribe participated in the pending proceedings, albeit not as a party-defendant.

On August 28, 2003, the District Court granted the State's motion for a protective order and stayed the scheduled deposition pending a ruling on the State's motion to dismiss. *Petition Appendix E.*

On October 3, 2003, the Tribe and the State of Washington entered into a cigarette tax compact. *Petition Appendix F.* The Tribe contractually obligated itself to enact and collect a tribal tax on cigarettes sold on the reservation by Tribal retailers to non-Indian and non-tribal member Indian purchasers. *Id.* at F-7, F-8. In return, the State obligated itself *not* to collect state cigarette taxes and sales and use taxes on such sales. *Id.* at F-8. The contract is for a term of eight years, and it automatically renews for successive terms of eight years unless either the Tribe or the State objects to renewal in writing. *Id.* at F-23. In the Preamble, the contract states that "the mutual interests of the Swinomish Tribe and the State of Washington brought these two governments together to pursue their common interests . . . " *Id.* at F-2.

Neither the Governor nor the Tribe informed the District Court that the contract had been executed by both parties, and thus the District Court was unaware of this fact when it granted the State's motion to dismiss on October 20, 2003. *Wilbur*, 423 F.3d at 1105. The District Court "based its decision on the proposition that the Tax Injunction Act deprived it of subject matter jurisdiction over the Wilburs' suit," and "dismissed the action without discussing the State's other arguments." *Id.*

The Court of Appeals affirmed but upon different grounds. The Ninth Circuit rejected the contention that the Tax Injunction Act barred the suit. The Court of Appeals also rejected the State's contentions that the Wilburs' lacked standing. *Id.* at 1107-09. The State raised the additional contention that the Wilburs' suit was moot, and the Court of Appeals rejected that contention as well. *Id.* at 1109. The Court agreed that the Eleventh Amendment barred the Wilburs' claims against the state agency defendant (the Washington Department of Revenue), but rejected the State's contention that their claims against the individual defendants were barred. *Id.* at 1111. However, the Ninth Circuit affirmed the dismissal of the Wilburs' suit against the remaining defendants (the

Governor and the two Revenue Department officials) on the ground that the Tribe was both a necessary and an indispensable party. *Id.* at 1111-15.

The Circuit Court recognized that the Tribe had an interest in the outcome of the Wilburs' suit because the Wilburs were seeking to establish the illegality and unenforceability of the Tribe's contract with the State. *Id.* at 1112. The Court further recognized, and the Wilburs did not dispute, that joinder of the Tribe was not feasible because it enjoyed sovereign immunity. *Id.*

The Wilburs contended that the Tribe's interests would be adequately represented by the Governor, who was both a party to the suit, and a signatory on the contract between the State and the Tribe. *Id.* at 1113. The Ninth Circuit rejected this contention, relying on its prior decision in *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002). The Circuit Court concluded that because Washington State "owes the Tribe no trust duty that might ensure vindication of the Tribe's interest," the Governor could not be counted upon to adequately represent the Tribe's interests. *Wilbur*, 423 F.3d at 1113. The Court rejected the Wilburs' argument that the Governor could adequately represent the Tribe's interest in seeing their contract upheld because it ran counter to the Ninth Circuit's longstanding rule that all parties to a contract must be parties to any suit seeking to invalidate that contract. *Id.* at 1114.

Beginning with the case of *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), and continuing to the modern day in cases like *Dawavendewa v. Salt River Project*, 276 F.3d 1150 (9th Cir. 2002), the Ninth Circuit has adhered to this inflexible rule, and it applied the rule to the present case: "As we stated in *Dawavendewa*, it is a 'fundamental principle' that a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Wilbur*, 423

F.3d at 1113. Invoking *Lomayaktewa*, the Court said: "No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable." *Wilbur*, at 1113, quoting *Lomayaktewa*, 520 F.2d at 1325.

In the course of its decision, the Circuit Court purported to address the four factors listed in FRCP 19(b). The Court considered: (1) the extent to which a judgment in the Tribe's absence might be prejudicial to the Tribe or to the State defendants; (2) the extent to which prejudice could be lessened or avoided by the shaping of relief; (3) whether a judgment in the absence of the Tribe would be adequate;[1] and (4) whether the plaintiffs would have an adequate alternative remedy if their suit was dismissed for nonjoinder of the Tribe. *Id.* The Court concluded that the first three factors pointed towards dismissal because the only relief sought by the plaintiffs would, if granted, prejudice the Tribe. *Id.* at 1114-15. The Court concluded that the fourth factor supported the Wilburs' contention that their suit should proceed in the absence of the Tribe because "it is unclear whether the Wilburs will have an adequate remedy if the action is dismissed." *Id.* at 1115.

Adhering to Circuit precedent, the Court held that even though dismissal would leave the Wilburs with no forum for relief, their suit had to be dismised:

> [E]ven assuming the Wilburs have no other forum in which to pursue a remedy, we have "regularly held that the tribal interest in immunity

[1] Instead of analyzing the adequacy of a judgment granting injunctive or declaratory relief to the plaintiffs, the Ninth Circuit examined the prejudicial effect that such a judgment would have upon the absent Tribe. *Wilbur*, 423 F.3d at 1114. Thus the Court simply treated the third factor of Rule 19(b) as duplicative of the first and second factors. In effect, the Court eliminated the third factor.

> overcomes the lack of an alternative remedy or forum for the plaintiffs."

Wilbur, 423 F.3d at 1115, *citing Hull*, 305 F.3d at 1025.

The Wilburs noted that under Ninth Circuit precedent, "if no alternative forum is available to the plaintiff, the court should be 'extra cautious' before dismissing the suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990). On the other hand, the Wilburs recognized that the *Makah* case also held that "lack of an alternative forum does not automatically prevent dismissal of a suit." *Id.* at 560. The Wilburs challenged the latter holding of *Makah*, and asked the Court to overrule, or at least to sharply narrow and confine, that portion of the *Makah* decision which holds that a complete lack of any judicial forum does not preclude a Rule 19(b) dismissal.

None of the Ninth Circuit's prior opinions had addressed the First Amendment ramifications of dismissals which left plaintiffs without any alternative forum in which to bring suit. The Wilburs argued that in cases like theirs, where the absent party had both knowledge of the plaintiff's suit and the ability to intervene, a Rule 19(b) dismissal that left a plaintiff without any forum for judicial redress would violate the Petition Clause of the First Amendment. *Brief of Appellants*, at 31.

In support of this argument, the Wilburs cited two recent state supreme court decisions where the courts held that because an indispensable party dismissal would leave the plaintiffs without any alternative forum in which to seek relief, their suits should *not* be dismissed for failure to join an Indian tribe whose interests were also at stake in the litigation. *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.S.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 564 (2003), *certiorari denied*, 124 S.Ct. 570 (2003); *Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004). The Ninth Circuit declined to follow the approach taken by the New York and Wisconsin state courts because those courts were not applying FRCP 19, and were instead applying their own state court rules regarding the joinder of parties.

Wilbur, 423 F.3d at 1116. Reasoning that it was bound to apply prior Ninth Circuit precedent interpreting the identical federal rule, the panel rejected the Wilburs' request to overrule or limit Circuit precedent.

The New York and Wisconsin state courts did not expressly rely on the First Amendment, nor did they mention the Petition Clause. However, they did stress the importance of affording plaintiffs an opportunity to bring suit in some judicial forum rather than closing the doors of every court to them. The Ninth Circuit rejected the Wilburs' express reliance upon the Petition Clause, reasoning that although the right of access to the courts is a constitutionally protected aspect of the right to petition the government for redress of grievances, this right is not an "absolute" right. *Wilbur*, 423 F.3d at 1116. The Circuit Court reasoned that the Wilburs had only a right to "reasonable" access to the courts, and that this right of "reasonable" access was not violated even though the Wilburs were left with no access to any court. *Id.* The Court concluded that so long as there exists a written rule that governs dismissal motions based upon failure to join a party, the right to "reasonable" access to the courts will never be violated, because the Petition Clause merely requires that there exist "prescribed procedures" for deciding who gets access to the courts and who does not:

> [T]he Wilburs rely on cases stating the general proposition that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983). This does not aid the Wilburs, however, for the right of access to the courts is not absolute. *See Hudson v. Palmer*, 468 U.S. 517, 523, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) ("[T]he constitutional right to petition the Government for redress of their grievances . . . includes a *reasonable* right of access to the courts" (emphasis added)). Moreover,

> the right must be exercised "within the limits . . . of [the courts'] prescribed procedures." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).

Wilbur, 423 F.3d at 1116.

Finally, the Wilburs argued that their case fell within the "public rights" exception to Rule 19(b). Under this exception, an absent party is *not* deemed indispensable and dismissal is *not* warranted when the plaintiffs' suit seeks to vindicate important public rights which transcend the private interests of the litigants. The Circuit Court rejected this contention as well. It recognized that the rights the Wilburs sought to vindicate transcended their own private interests. Nevertheless, the Court held that the exception could not be applied because the suit sought to "destroy the legal entitlement" of the absent Tribe by invalidating the State's contractual promise to refrain from collecting state taxes that it would otherwise collect. *Wilbur*, 423 F.3d at 1115.

REASONS FOR GRANTING THE WRIT

1. INTRODUCTION

In the past five years, several courts have struggled with the issue of whether suits against state and federal governmental officials can proceed in the absence of Indian tribes which have interests which may be affected by the litigation. Indian tribes have sovereign immunity and, in the absence of Congressional action removing that immunity, they cannot be sued without their consent. Therefore, when Indian tribes refuse to waive their sovereign immunity and decline to participate in a suit that has been brought against state or federal government officials, their nonparticipation can lead to a dismissal if the court in question determines that the absent tribe is an indispensable party.

Government officials named as defendants in these cases have sought dismissal of the suits against them, arguing that the absent tribe is an "indispensable party"

without whom the suit may not proceed. The Tenth Circuit and the highest state courts in New York and Wisconsin have rejected these arguments. Taking a practical approach, these courts have emphasized the point that a dismissal would leave the plaintiffs with no alternate judicial forum. Recognizing that a dismissal would make it impossible for anyone to litigate serious constitutional questions, these courts have held that a tribe's refusal to consent to participation as a party in such a case cannot be permitted to effectively foreclose all judicial review of these questions. Because the absent tribe voluntarily chose not to participate in the suit, and because as a practical matter the absent tribe's interests were either substantially similar or identical to the interests of government officials who were parties to the suit, these courts have held that such suits should not be dismissed.

Only the Ninth Circuit has taken a different approach. The Ninth Circuit has consistently held that whenever an Indian tribe is a party to a contract being challenged by the plaintiffs, the tribe must *always* be considered an indispensable party, and such suits must *always* be dismissed pursuant to Rule 19(b). Even in cases such as the present one, where the "absent" tribe has filed pleadings with the Court to support the positions taken by the named party defendants, and even where the tribe's interest in upholding the legality of its contract with state government officials is identical to the interests of the defendant State government officials, the Ninth Circuit has adhered to an inflexible rule that all such suits must be dismissed. According to the Ninth Circuit, it is a "fundamental principle" that in all cases where a contract is challenged, a party to that contract that is not susceptible to joinder is an indispensable party.

Thus, the decision in this case stands at odds with decisions of several other courts, both state and federal. The Ninth Circuit's inflexible approach is also inconsistent with this Court's decisions in *Provident Tradesmens Bank & Trust v. Patterson*, 390 U.S. 102 (1968) and *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940). This Court has condemned mechanistic approaches to indispensable party

analysis where the result is dictated by invocation of an inflexible rule. Even though this Court has held that joinder of all parties to a contract is not required when the plaintiff's suit is seeking to vindicate public rights, the Ninth Circuit continues to apply an inflexible rule that a party to a contract is always an indispensable party to any suit where there is a challenge to that contract.

Moreover, the Ninth Circuit's Rule 19(b) jurisprudence has consistently refused to recognize the constitutional significance of dismissals which leave plaintiffs without any alternate judicial forum in which to litigate their claims. Petitioners argued below that the dismissal of their suit would violate the Petition Clause of the First Amendment because it would leave them with no means of petitioning the government for redress of their grievances. The Ninth Circuit's rejection of this contention is at odds with several Petition Clause decisions of this Court.

Although other courts, state and federal, have construed and applied Rule 19(b) so as to avoid the Petition Clause problem of leaving plaintiffs without any judicial forum for redress of their grievances, the Ninth Circuit refuses to do the same. In addition, although several decisions of this Court have stressed that the constitutional right of access to the courts requires that regulation of litigation must leave litigants with some reasonable alternative means of bringing their claims before a court, the decision in this case leaves the plaintiffs with no means of having their claims addressed by any court.

For all of these reasons, a writ of certiorari should issue in this case so that these conflicts may be resolved.

2. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PETITION CLAUSE JURISPRUDENCE.

The right to petition is one of "the most precious of the liberties safeguarded by the Bill of Rights," *BE & K Construction Company v. NLRB*, 536 U.S. 516, 524 (2002); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967). The right is implied by "[t]he very idea of a government republican in form." *BE & K*, at 525, quoting

United States v. Cruikshank, 92 S.Ct. 542, 552 (1876); *accord McDonald v. Smith*, 472 U.S. 479, 482 (1985). It extends not only to efforts to influence legislators and executive officials, but also to efforts to seek judicial redress for wrongs suffered by resorting to litigation. This Court has repeatedly "recognized that the right of access to courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). *Accord BE & K*, 536 U.S. at 536 (even losing retaliatory litigation is protected by Petition Clause unless it is also baseless); *Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49 (1993) (same); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right to petition"); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 6 (1964) ("It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right" to recommend lawyers to injured workmen who wish to bring lawsuits); *NAACP v. Button*, 371 U.S. 415, 428-431 (1963) (ban on solicitation of clients violates First Amendment right to seek "to vindicate the legal rights of members" through litigation).

Nor is the Petition Clause right to resort to litigation for redress of grievances limited to suits "bound up with political matters of acute social moment, as in *Button* . . . "; it applies as well to small economic disputes. *Mine Workers*, 389 U.S. at 356-57; *Railroad Trainmen*, 377 U.S. at 8 (rejecting dissenters' view that personal injury litigation is not constitutionally protected the way civil rights litigation is); *United Transportation Union v. State Bar*, 401 U.S. 576, 585-86 (1971); *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

a. Conflict With this Court's *Noerr-Pennington* Line of Cases.

Given the Petition Clause's essential function in our form of government, this Court has consistently "considered

the right to petition when interpreting federal law." *BE & K*, 536 U.S. at 525. This Court has been careful to construe both the Sherman Anti-Trust Act and the National Labor Relations Act ("NLRA") so as to exempt the exercise of the right to petition from the scope of those statutes. *See, e.g., Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 138 (1961) (construing Sherman Act as not prohibiting lobbying of the legislature or the executive because a contrary construction "would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) (same); *Bill Johnson's Restaurants*, 461 U.S. at 741 (1983) (recognizing need to "be sensitive to these First Amendment values in construing the NLRA"); *BE & K*, 536 U.S. at 536 ("because there is nothing in the statutory text indicating that § 158(a)(1) must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, we decline to do so," thereby avoiding serious Petition Clause question).

In light of the serious constitutional questions that would be raised by holding that they could not sue the Washington State officials in *any* court, the Wilburs argued below that Rule 19(b) should be construed so as to prohibit a dismissal in cases like theirs, where a dismissal would leave the plaintiff without any judicial forum where their case could be heard. The Ninth Circuit acknowledged that the Wilburs were arguing that the Petition Clause gave added weight to the fourth factor enumerated in Rule 19(b), and explicitly rejected this argument, holding that the Tribe's interest in being shielded from suit outweighed the Wilburs' Petition Clause rights. *Wilbur*, 423 F.3d at 1116.

Thus the Ninth Circuit refused to construe Rule 19(b) so as to avoid the constitutional implications of leaving a plaintiff without any judicial forum for relief. This refusal is inconsistent with this Court's decisions in *Noerr*,

Pennington, *Bill Johnson's Restaurants*, and *BE & K*, all of which explicitly hold that federal courts should "consider[] the right to petition when interpreting federal law." *BE & K*, 536 U.S. at 525.

b. Conflict with *Avery*, *Gilmore*, *Wolff* and *Bounds*

The Ninth Circuit has consistently held that the fact that a plaintiff will be unable to bring suit in any court does not preclude the granting of a Rule 19(b) dismissal. In the present case, the Ninth Circuit for the first time held that such a dismissal does not violate the Petition Clause either. This conclusion conflicts with a line of this Court's "access to court" cases which specifically hold statutes and rules which leave a prospective litigant without any means of litigating are unconstitutional.

Beginning with *Ex Parte Hull*, 312 U.S. 546, 642 (1941), this Court has struck down laws and regulations which impair a prisoner's ability to apply to a federal court for relief from alleged constitutional violations. In *Johnson v. Avery*, 393 U.S. 483 (1969), this Court struck down a prison regulation because it obstructed prisoners' access to the federal courts by denying them one form of legal assistance *without supplying any alternative* means of assistance: "Tennessee does not provide an available alternative to the assistance provided by other inmates." 393 U.S. at 488. The effect of banning inmate assistance *without* providing some reasonable alternative rendered the regulation unconstitutional.

> [U]nless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here at issue, barring inmates from furnishing such assistance to other prisoners.

Avery, 393 U.S. at 490.

The scope of the fundamental right to access to the courts recognized in *Avery* was subsequently extended from habeas petitioners challenging their convictions, to civil rights plaintiffs challenging the conditions of confinement,

Cruz v. Beto, 405 U.S. 319 (1972), and then to all civil plaintiffs. *Wolff v. McDonnell*, 418 U.S. 539 (1974). While the source of this fundamental right remained unspecified, the Court specifically recognized that it was not confined to prisoners. *Cruz*, at 321 ("persons in prison, like other individuals, have the right to petition the Government for redress of grievances").[2]

In *Younger v. Gilmore*, 404 U.S. 15 (1971), *Wolff*, *supra*, and *Bounds v. Smith*, 430 U.S. 817 (1977), this Court continued to recognize the constitutional requirement that when foreclosing one means of legal assistance, states must provide some alternative means of gaining access to the courts. The Court repeatedly stressed that there was more than one way to do this, and that a state could foreclose one means of gaining access to court, so long as it provided some alternative means. *See Bounds*, 430 U.S. at 818, 828 (describing the issue as "whether States must protect the right of prisoners to access to the courts by providing them with law libraries *or alternative* sources of legal knowledge," and answering that question in the affirmative); *Wolff*, 418 U.S. at 580 (remanding with

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[2] In *Wolff* the Court stated that "the right of access to the courts . . . is founded in the Due Process Clause, and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." 418 U.S. at 579. Three years later, the dissenters in *Bounds* suggested that the right was "created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived." *Bounds*, 430 U.S. at 840 (Rehnquist, J., dissenting). More recently, in *Lewis v. Casey*, 518 U.S. 343 (1996), Justice Thomas opined that this right was "rooted in the Due Process Clause." *Id.* at 381 (Thomas, J., concurring). In his dissent, Justice Stevens suggested that the right was part of the First Amendment freedoms retained by prisoners, which includes "the freedom to petition their government for a redress of grievances," and specifically connected the *Avery* line of cases with Petition Clause cases such as *California Motor Transport*, *supra*. *Lewis*, at 405 & n.1 (Stevens, J., dissenting). Thus the principle articulated in the prisoner cases is equally applicable to cases that do not involve prisoners, where the right of access has consistently been described as rooted in the Petition Clause.

directions that the District Court assess the adequacy of legal assistance provided to prisoners "under the *reasonable-alternative standard* of *Avery*.")

In the present case, the Ninth Circuit has held that it is irrelevant that a Rule 19(b) dismissal leaves the Wilburs with no forum in which they can sue the state officials. The Ninth Circuit, quoting *Hudson v. Palmer*, 468 U.S. 517, 523 (1984), reasons that since the "right of access to the courts is not absolute," the Wilburs need only be provided with "a *reasonable* right of access to the courts." *Wilbur*, 423 F.3d at 1116 (emphasis added by the Circuit Court). Paradoxically, the Ninth Circuit then concluded that even though it assumes that following a Rule 19(b) dismissal "the Wilburs will have no other forum in which to pursue a remedy," *id.*, nevertheless they will have been afforded "reasonable access to the courts," and thus the Petition Clause will not be violated. The Court did not explain how no access could constitute "reasonable access" to the courts.

Moreover, *Hudson* provides no support for the conclusion that dismissal of the Wilburs' complaint is constitutional. The issue in *Hudson* was whether a prison inmate had a reasonable expectation of privacy in his prison cell entitling him to Fourth Amendment protection against the warrantless search of his cell. This Court compared the asserted Fourth Amendment rights with other constitutional rights. The First Amendment right "to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts," was recognized as fully retained by prisoners. *Hudson*, 468 U.S. at 523, *citing Avery*, *supra*. In contrast, the retention of such Fourth Amendment rights by a convicted prison inmate was held to be fundamentally incompatible with the need of prison officials to ensure institutional security and internal order. Accordingly, this Court held that prison inmates had no such Fourth Amendment privacy rights in their prison cells. *Hudson*, 468 U.S. at 527-28.

The merits of Hudson's constitutional claim were addressed by the federal courts. Although he lost his case,

Hudson *was* afforded access to the courts. Thus, *Hudson* provides no support for the Ninth Circuit's conclusion that it is constitutionally permissible to reject the Wilburs' suit and to leave them without any judicial forum in which they can seek redress. No one contended that Hudson's Fourth Amendment claim could not be litigated in the federal courts and, thus, there was no occasion for this Court to make any holding regarding the scope of the Petition Clause.

In the present case, the Ninth Circuit's decision has left law abiding citizens with *less* First Amendment Petition Clause freedom than that which this Court acknowledges is retained and enjoyed by prison inmates. Moreover, by concluding that the complete absence of any alternate forum is constitutionally acceptable, the decision below conflicts with this Court's decisions in *Avery, Gilmore, Wolff* and *Bounds,* which expressly recognize the constitutional imperative that some reasonable means of obtaining access to the courts must be left open. If there is no way for a litigant to get his federal claims addressed, then the First Amendment right to seek redress for an alleged violation of those rights has been violated.

3. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THE HIGHEST COURTS OF NEW YORK AND WISCONSIN. THESE COURTS HAVE RECENTLY HELD THAT A TRIBE'S UNWILLINGNESS TO PARTICIPATE IN A LAWSUIT CANNOT BE PERMITTED TO FUNCTION AS A VETO OVER A PLAINTIFF'S RIGHT TO SEEK JUDICIAL REDRESS AGAINST STATE GOVERNMENT ACTORS.

The Ninth Circuit recognized that its decision is in conflict with recent decisions of two state courts, and declined to follow them, choosing instead to follow prior Ninth Circuit precedent. In *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.S.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 564 (2003), *certiorari denied*, 124 S.Ct. 570 (2003), New York's highest court held that even though a

ruling in favor of a plaintiff might impair an interest of an Indian tribe that was not a party to the suit, the suit would not be dismissed for failure to join an indispensable party because such a dismissal would, in conjunction with the tribe's sovereign immunity, result in the complete inability of anyone to litigate a serious claim that constitutional rights were being violated by state officials. That case, like the present case, also involved a challenge to a compact entered into by a Indian Tribe and a state Governor. The plaintiffs contended that by entering into a compact regulating gaming on Indian reservations, the Governor had violated the separation of powers provisions of the New York Constitution.

The *Pataki* lawsuit was brought by a number of New York state legislators, a business organization, and by citizen taxpayers, seeking to vindicate an important constitutional principle. The New York Court of Appeals ruled that the suit could *not* be dismissed for failure to join the Indian Tribe as an indispensable party, because to do so would make it impossible for anyone to vindicate the claimed constitutional right.

> The Tribe is not a party to this action. Although its chosen interests are certainly affected by this litigation, ***the Tribe has chosen not to participate.*** Unless Congress provides otherwise, Indian tribes possess sovereign immunity against the judicial processes of states. [Citations]. As a result, New York courts cannot force the Tribe to participate in this lawsuit. ***The State claims that the Tribe's absence requires us to dismiss this action. We disagree.***
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> * * *
>
> The State . . . argues that the prejudice to the Tribe caused by a judgment eviscerating the authority [the gaming compact] under which it operates the casino should be sufficient to dismiss the action. In contrast, ***plaintiffs . . . argu[e] that there can be no remedy for the alleged constitutional violation if the Tribe's absence requires dismissal.***

> ***Plaintiff's arguments are on firmer ground.*** Not only will these plaintiffs be stripped of a remedy ***if we hold that the Tribe is an indispensable party, but no member of the public will ever be able to bring this constitutional challenge.***

Pataki, 100 N.Y.2d at 819-820 (bold italics added). Recognizing that it was antithetical to our system of checks and balances to permit a Governor to engage in conduct alleged to be unconstitutional, without permitting anyone to litigate the legality of such conduct, the New York Court of Appeals held that dismissal for failure to join an indispensable party would not be proper.

The *Pataki* Court also recognized that the general purpose of the rule requiring dismissal in the absence of a party whose interest might be impaired by the litigation was to guarantee the absent party a meaningful opportunity to be heard. This interest was not implicated in cases where the only reason why the party would not be heard was simply that the party chose not to participate in the suit:

> The Tribe has chosen to be absent. Nobody has denied it the "opportunity to be heard"; in fact the Oneida Indian Nation, which operates the Indian Turning Stone Casino, has appeared amicus making much the same arguments we would expect to be made by the Tribe had it chosen to participate. While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego resolution of all disputes that could affect the Tribe. [Citations.] ***While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court.***

Pataki, 100 N.Y.2d at 820-21 (bold italics added).

Similarly, in *Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004), the Wisconsin Supreme Court followed the lead of

the *Pataki* Court and held that a suit against the Wisconsin Governor could proceed notwithstanding the absence of an Indian tribe. In that case two legislators challenged the constitutional validity of the Governor's agreement with an Indian tribe to make certain amendments to a gaming compact between the tribe and the State. The Wisconsin Governor argued, just as the Washington Governor argued in this case, that because the tribe was not a party to the suit and could not be made a party without its consent, the action had to be dismissed. Although the tribe had an interest in the lawsuit which might be impaired by a ruling in favor of the plaintiffs, the Wisconsin Supreme Court held that the tribe was *not* an indispensable party and rejected the argument that the action had to be dismissed:

> The Tribe's decision not to participate as a party cannot deprive this court of its own core power to interpret the Wisconsin Constitution and resolve disputes between co-equal branches of state government. ***The Tribe has been aware of this litigation from its inception. The Court would have welcomed its intervention.*** We will not venture the delicate balance of shared power among our three branches of government on the chosen absence of a potential party.
>
> ***The upshot of accepting the Governor's invitation to dispose of this case on procedural technicalities would be to insulate this agreement and any future agreement between a governor and tribe from the powers of state judicial review.*** For over 200 years it has been the province of the judiciary to interpret the constitution and say what the law is. [Citations]. We are responsible for resolving legal disputes among the three branches of our state government and, therefore, we proceed to the merits of the case.

Panzer, 680 N.W.2d at 683 (bold italics added).

Like the tribe in the *Pataki* case, the Swinomish Tribe *did* participate in the District Court proceedings, but

carefully stopped short of intervening as a party, choosing instead to file a pleading on behalf of a deponent in which it supported the positions taken by the Washington State officers. In this respect the Swinomish Tribe can be seen as trying to have its cake and eat it too – by participating, but (technically) not participating as a party, and thus maintaining its stance as an indispensable "absent" party. The Tribe deliberately sought to assist the Governor in his efforts to win dismissal of the suit, and succeeded, thereby and leaving the Wilburs with no forum in which to litigate.

The Ninth Circuit declined to follow these two state court decisions, commenting that they were not binding upon it because they were not rulings applying FRCP 19(b), but were instead applications of parallel state court joinder rules.[3]

4. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH TWO DECISIONS OF THE TENTH CIRCUIT.

The Ninth Circuit's decision is also in conflict with two decisions of the Tenth Circuit, *Sac & Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001), *certiorari denied sub nom. Wyandotte Nation v. Sac & Fox Nation*, 534 U.S. 1078 (2002), and *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001). In both of these cases the Tenth Circuit held that an Indian tribe was not an indispensable party to a lawsuit against government officials because the tribe had chosen not to participate and the tribe's interests were virtually identical to the interests of others who were parties to the suit. Moreover, these cases *did* apply FRCP

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[3] While it is true that these state court decisions involved state court joinder statutes, this technicality provides no logical basis for rejecting the reasoning of those decisions. Moreover, the wording of Wisconsin Statute § 803.03(3) is nearly identical to FRCP 19(b), and is based on the federal rule. *See* Wis. Judicial Council Committee Note (1974). For this reason Wisconsin courts have looked to federal cases applying FRCP 19(b) for guidance when deciding "indispensable party" issues. *See, e.g., Dairyland Greyhound Park, Inc. v. McCallum*, 258 Wis.2d 210, 655 N.W.2d 474 (2002).

19(b) and, thus, are squarely in conflict with the decision in the present case.

In *Sac & Fox Nation*, the Governor of Kansas and various Indian tribes brought suit against the Secretary of the Interior, seeking to prevent him from taking a tract of land into trust on behalf of the Wyandotte Tribe and approving gaming activities on that land. Like the Swinomish Tribe in the present case, the Wyandotte Tribe filed pleadings in the District Court, but it refused to waive its sovereign immunity. The District Court granted the Interior Secretary's Rule 19(b) motion to dismiss, holding that the Wyandotte Tribe was an indispensable party, but the Tenth Circuit reversed. The arguments made by the *Sac & Fox Nation* plaintiffs were virtually identical to those made by the Wilbur petitioners, and the Tenth Circuit accepted them. The Court recognized that the Wyandotte Tribe had an economic interest in gaming activities which might be impaired by the suit. Nevertheless, the Tenth Circuit held that "the district court abused its discretion in finding the Wyandotte tribe was an indispensable party" because: (1) the Secretary of the Interior's interests were "substantially similar, if not identical, to those of the Wyandotte Tribe"; (2) "the Wyandotte Tribe has filed pleadings at virtually all stages of this litigation and has consistently offered its views regarding why the Secretary's actions were appropriate"; and (3) "[f]inally, and perhaps most important, there does not appear to be any alternative forum in which plaintiffs' claims can be heard." *Id.* at 1259-1260. All three of these factors are also present in the Wilburs' case.

Whereas the Ninth Circuit does not see the lack of an alternative forum as a factor of great or decisive significance, the Tenth Circuit does. *Sac & Fox Nation*, 240 F.3d at 1260, citing *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1413 (10th Cir. 1996), for the proposition that "the absence of an alternative forum would weigh heavily, if not conclusively against dismissal." Shortly after *Sac & Fox Nation* was decided, the Tenth Circuit affirmed a district court denial of a Rule 19(b) motion to dismiss in another case involving an absent

Indian tribe. Once again the Tenth Circuit held that the absent tribe was not an indispensable party because the interests of existing defendants were "substantially similar, if not identical, to the Tribe's interests." *Kansas v. United States*, 249 F.3d at 1227.

5. THE NINTH CIRCUIT'S ADHERENCE TO AN INFLEXIBLE RULE OF DISMISSAL IN ALL CASES INVOLVING A CHALLENGE TO A CONTRACT WHERE AN ABSENT PARTY HAS AN INTEREST IN SEEING THE CONTRACT UPHELD, IS IN CONFLICT WITH THIS COURT'S DECISION IN *PROVIDENT TRADESMENS BANK & TRUST*, WHICH HOLDS THAT RULE 19(b) IS TO BE APPLIED ON A CASE-BY-CASE BASIS.

FRCP 19 was substantially revised in 1966. Two years after this revision, this Court clarified the meaning of the Rule in *Provident Tradesmens Bank & Trust v. Patterson*, 390 U.S. 102 (1968). The revision of the Rule "was not intended as a change in principles" but was motivated instead by the fact that the text of the old Rule was "defective in phrasing" and did not provide clear guidance to the district courts. *Id.* at 118. The revised text of the Rule "emphasizes the pragmatic consideration of the effects of the alternatives of proceeding or dismissing, "whereas "the older version tended to emphasize classification of parties as 'necessary' or 'indispensable.'" *Id.* In its Note on the 1966 Revision of Rule 19, the Advisory Committee on the Federal Rules of Civil Procedure noted that under the old Rule "there had at times been undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated . . . " *Id.*

> The imprecise and confusing language of the original wording of the Rule produced a variety of responses in the lower courts. In some cases, a

> formulaic approach was employed, making it difficult now to determine whether the result reached was proper or not.

Id. at 120.[4]

The Ninth Circuit continues to employ this kind of formulaic analysis, even though the 1966 revision of FRCP 19(b) was designed to put an end to it, and even though this Court held such analysis to be improper in the *Provident Tradesmens* case. The Ninth Circuit has adhered to an inflexible rule that it has routinely applied in all cases involving suits to invalidate contracts. In all such cases the Ninth Circuit believes that it is a "fundamental principle" (*Dawavendewa*, 276 F.3d at 1157), which is "deeply imbedded in the common law" (*Lomayaktewa*, 520 F.2d at 1325), that "in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Id.*

The origin of these modern Ninth Circuit decisions can be found in cases that pre-date the 1966 revision to Rule 19, and these pre-1966 cases engage in precisely the same type of mechanistic analysis which this Court condemned in *Provident Tradesmens*. For example, *Lomayaktewa,* the fount of modern Ninth Circuit case law on this point, purports to rely upon this Court's decision in *Shields v. Barrow*, 58 U.S. 130 (1854). Similarly, in *Provident Tradesmens,* the Third Circuit purported to rely on *Shields* as support for its conclusion that the absent party was indispensable. But this Court found the Third Circuit

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[4] The Ninth Circuit was a perfect example of a Court that had been applying an overly "mechanistic" type of Rule 19(b) analysis that "lent itself more to a thoughtless reiteration of formulae than to a decision based on the underlying policy considerations that should lead a court to find a particular person indispensable." Wright & Miller, 7 *Federal Practice and Procedure* (3d ed.), § 1607, citing *Washington v. United States*, 187 F.2d 421 (9th Cir. 1936). In that case the Ninth Circuit concluded that a person automatically should be categorized as indispensable if his interest in property was joint rather than several. Professor Wright criticized such analysis as characteristic of the woodenness of many pre-1966 decisions.

had misread *Shields* as endorsing a *per se* rule of indispensability for all absent parties whose interests might be affected by the litigation. *Provident Tradesmens*, 390 U.S. at 125. In *Lomayaktewa* the Ninth Circuit made the same of misreading *Shields*, and continues to make that same mistake today.[5]

In *Provident Tradesmens,* this Court stressed the point that across-the-board rules for deciding when a case must be dismissed under Rule 19(b) are improper. "Whether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation." *Provident Tradesmens*, 390 U.S. at 118. But the Ninth Circuit has eschewed the case-by-case approach, which this Court has approved, in favor of a bright line rule for all cases in which contracts are challenged. In such cases, every party to the contract whose joinder is not feasible is an indispensable party whose absence necessitates a dismissal. This fixed rule approach conflicts with this Court's decision in *Provident Tradesmens*.

By refusing to consider the particular facts of the case – that the Swinomish Tribe submitted a pleading to the Court supporting the positions taken by the defendant, and that the Tribe's interest in upholding the contract was identical to the Governor's interests – the Ninth Circuit applied precisely the type of hidebound, "mechanistic" Rule 19(b) analysis which this Court condemned in *Provident Tradesmens*. This improper formulaic approach to 19(b) analysis led the Ninth Circuit to uphold the District Court's dismissal of the Wilburs' suit, even though the District Court's dismissal had *not* been predicated on Rule 19(b) grounds.

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[5] There is language in *Shields* which is easily susceptible to such a misreading, and in *Tradesmens Bank* this Court acknowledged that the *Shields* Court's attempt to state general definitions of the terms "necessary" and "indispensable" parties was "perhaps unfortunate[ ]." *Tradesmens Bank*, 390 U.S. at 123.

As *Provident Tradesmens* recognizes, the overriding consideration in any Rule 19(b) case is "whether in equity and good conscience the action should proceed" in the absence of the interested party. Rather than consider the particular facts that bear upon that question, the Ninth Circuit instead applied its rule for all contract cases and dismissed the case.

6. THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S DECISION IN *NATIONAL LICORICE*.

The decision below is also in conflict with this Court's decision in *National Licorice, Co. v. NLRB*, 309 U.S. 350 (1940), where this Court specifically *rejected* the contention that every party to a contract was an indispensable party to a suit seeking to invalidate that contract. In that case the NLRB ordered an employer not to enforce contracts it had entered into with its employees, because those contracts were procured by means of unfair labor practices in violation of the National Labor Relations Act. The issue before this Court was whether the Board had the authority to issue such an order "in the absence of the employees as parties to the proceeding." *Id.* at 351. This Court held that because the labor contracts in question were "the fruits" of unfair labor practices committed in violation of the National Labor Relations Act, it was permissible to litigate the case in the absence of parties to the contract even though the final result was to invalidate the contract. *Id.* at 361. In the present case, the Wilburs contend that the cigarette tax contract, like the contracts whose enforcement was enjoined in *National Licorice*, was the fruit of violations of several statutory and constitutional provisions; consequently the Tribe is not an indispensable party to this suit, just as the employees were not indispensable parties in *National Licorice*. *Id.* at 366.

In *National Licorice*, this Court noted that where contractual rights may be affected by litigation, courts ordinarily "refuse to adjudicate the rights of some of the parties to the contract if the others are not before it." *Id.* at

363. But in a proceeding to enforce "public rights, there is little scope or need for traditional rules governing the joinder of parties in litigation determining private rights." *Id.* "[D]ifferent considerations may apply even in private litigation where the rights asserted arise independently of any contract which an adverse party may have made with another, not a party to the suit, even though their assertion may affect the ability of the former to fulfill his contract." *Id.* Because the rights asserted by the NLRB were not rights "arising upon or derived from the contracts" between the employer and the absent employees, this Court held that the absence of the employees did not prevent the suit from going forward, and the argument that the employees were indispensable parties was rejected. *Id.* at 364, 366.[6]

In the present case, the Wilburs were also seeking to vindicate public rights. Their suit alleged violations of the U.S. Constitution, the Washington Constitution, and several federal statutes. The Ninth Circuit's dismissal of their suit pursuant to an inflexible rule that all contract parties are indispensable parties conflicts with this Court's holding in *National Licorice* that they are not always indispensable parties, especially when the suit seeks to vindicate public rights.

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[6] For examples of cases where courts have applied *National Licorice* and held that the absence of parties to contracts did not require dismissal of the plaintiff's suit, *see Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 424 (2d Cir. 1975) ("When litigation seeks the vindication of a public right, third persons who may be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties."); *Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919, 929 (5th Cir. 1982) (same); *Natural Resources Defense Council, Inc. v. Berklund*, 458 F. Supp. 925, 933 (D..D.C. 1978), *aff'd* 609 F.2d 553 (D.C. Cir. 1979).

CONCLUSION

Over two hundred years ago, this Court acknowledged that "the very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives injury," and that one of the "first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Chief Justice Marshall traced this right to the "settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress." *Id.* Similarly, Hamilton defended the Constitution's creation of an independent judiciary by reasoning "that there ought always to be a constitutional method of giving efficacy to constitutional provisions." *The Federalist, No. 80,* p. 475 (C. Rossiter ed. 1961).

The decision below ignores this bedrock principle and holds that the Wilbur plaintiffs may *not* seek redress for constitutional and statutory wrongs done to them by Washington State officials solely because the Swinomish Tribe refuses to participate as a party in the lawsuit. Using FRCP 19(b) and sovereign immunity as a sword, the state officials and the Tribe have succeeded in entering into a contract that neither the Wilburs, nor anyone else in this country, may challenge in any court. The Tribe, fully cognizant of the Wilburs' suit, filed pleadings with the District Court and advocated support for the positions taken by the state officials and yet simultaneously declined to intervene as a party in the suit. With the Tribe choosing to sit on the sidelines in the passive role of cheerleader for the Governor, together Tribe and the Governor have perverted Rule 19(b)'s goal of preventing unfair litigation in the absence of a party whose interests might be impaired. The Ninth Circuit, woodenly applying a *per se* rule that all parties to contracts are indispensable parties in suits to invalidate such contracts, has permitted the Governor's tactic to succeed.

The highest courts in New York and Wisconsin, and the Tenth Circuit, in similar circumstances, have ruled that Indian tribes should *not* be allowed to use their immunity to suit as a means of preventing everyone in the world from challenging the constitutional and statutory legality of their interactions with government officials. Petitioners ask this Court to decide whether the approach taken by these courts is the proper course, and whether failure to follow this approach would violate the petitioners' right to seek judicial redress for their grievances under the Petition Clause of the First Amendment. For the reasons stated above, petitioners ask this Court to grant a writ of certiorari to review the decision entered below.

DATED this 6th day of December, 2005.

CARNEY BADLEY SPELLMAN, P.S.

JAMES E. LOBSENZ*
JOHN C. DIPPOLD
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Attorneys for Petitioner

APPENDIX A

2005 WL 2174485

United States Court of Appeals, Ninth Circuit.
Marvin WILBUR, Jr., Trustee of the Salish Trust dba Trading Post at March Point; Marvin Wilbur, Sr.; Joan Wilbur, Plaintiffs-Appellants,
v.
Gary LOCKE, Governor of the State of Washington; Frederick Kiga, Director, Revenue Department of the State of Washington; Gary O'Neil, Assistant Director, Revenue Department of the State of Washington; Revenue Department of the State of Washington; State of Washington, Defendants-Appellees.
No. 03-35911.

Argued and Submitted May 6, 2005.
Filed Sept. 9, 2005.

James E. Lobsenz, Carney Badley Spellman, P.S., Seattle, WA, for the plaintiffs-appellants.

Christine O. Gregoire, Attorney General, and David M. Hankins, Assistant Attorney General, Olympia, WA, for the defendants-appellees.

Appeal from the United States District Court for the Western District of Washington; Robert S. Lasnik, District Judge, Presiding. D.C. No. CV-03-00873-RSL.

Before: WALLACE, SILVERMAN, and PAEZ, Circuit Judges.

WALLACE, Senior Circuit Judge:

The plaintiffs sought relief from an anticipated contract between the State of Washington and the Swinomish Indian Tribe (Tribe) regarding taxation of cigarette sales by Indian retailers. The district court held that the

Tax Injunction Act (TIA), 28 U.S.C. § 1341, barred the action and dismissed it. The district court had jurisdiction over this timely appeal pursuant to 28 U.S.C. §§ 1331 and 2201, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm, but on grounds different from the district court.

I.

Washington law authorizes the Governor "to enter into contracts concerning the sale of cigarettes" with certain Indian tribes. Wash. Rev.Code § 43.06.450. Such contracts must "provide for a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers," but the tribe may "allow an exemption for sales to tribal members." *Id.* § 43.06.455(3). The contracts must also "provide that the tribal cigarette tax rate be one hundred percent of the state cigarette and state and local sales and use taxes within three years of enacting the tribal tax." *Id.* § 43.06.460. Tax revenue retained by a tribe must be used for certain statutorily defined "essential government services." *Id.* § 43.06.455(8), (14)(a). Thus, cigarette tax contracts must provide that the state will not impose any tax, and must require a tribe to collect taxes effectively equal to the previously imposed state taxes, and use the revenue for essential government services. In addition, cigarette tax contracts must include a number of provisions regulating Indian retailers' activities, such as provisions requiring tax stamps, governing the purchase of cigarettes by retailers, and ensuring compliance. *Id.* § 43.06.455(4), (5), (7).

Marvin Wilbur, Jr., Marvin Wilbur, Sr., and Joan Wilbur are enrolled members of the Tribe and the operators of a

retail store located on trust land within the Swinomish Indian Reservation. In April 2003, the Wilburs filed an action against various Washington officials and the Department of Revenue (State) alleging that the State and the Tribe were negotiating a cigarette tax contract. They alleged that the statutes governing cigarette tax contracts and the proposed agreement violated the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, the Sherman Antitrust Act, 15 U.S.C. §§ 7-276, the Treaty of Point Elliot, 12 Stat. 927 (Jan. 22, 1855), and a host of other constitutional and statutory provisions. The Tribe was not named as a defendant.

The complaint requested, among other relief, a declaratory judgment that Wash. Rev.Code §§ 43.06.450, 43.06.455, and 43.06.460 are "void, unlawful and unenforceable as applied to cigarettes transported, distributed, received or sold by Plaintiffs' retail businesses located within the exterior boundaries of the Swinomish reservation"; an injunction "preventing the Defendants from enforcing any provision of the statutes or contracting in any way with the Swinomish Tribe or any person or entity regarding a cigarette tax on any cigarettes to be received or sold by Indian-owned retail businesses within the exterior boundaries of the Swinomish Reservation"; and a "declaration that any agreement or contract entered into by the Swinomish Tribe with Defendants is invalid when attempted to be imposed or any way applied to Plaintiffs."

The State filed a motion to dismiss the Wilburs' complaint, arguing that the Wilburs lacked standing, that the TIA and the Eleventh Amendment barred the Wilburs' action, that the Tribe was an indispensable party, and that the complaint failed to state a claim for which relief could be granted. While that motion was pending, the State and the Tribe executed a cigarette tax contract (Compact).

However, because the parties did not inform the district court of this fact, the court was under the impression that the Compact was still awaiting approval by the Governor when it granted the State's motion to dismiss. Based largely on this misunderstanding, the court concluded that the Tribe was not a necessary party. The court asserted that the Wilburs "likely" lacked standing, but based its decision on the proposition that the TIA deprived it of subject matter jurisdiction over the Wilburs' suit. Therefore the district court dismissed the action without discussing the State's other arguments.

II.

The State urges us to affirm the district court's ruling that the TIA bars this action, or to affirm on one of the other grounds that it argued in the district court or on the additional ground that the case is now moot. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir.2004) ("We may affirm the district court's dismissal on any ground supported by the record"). Because we now know facts, undisclosed to the district court, bringing into question whether the Tribe is an indispensable party pursuant to Rule 19, we first determine whether we may proceed directly to the Rule 19 issue or whether we must first address jurisdictional issues.

The Supreme Court has "adhered to the requirement that a court address questions pertaining to its or a lower court's jurisdiction before proceeding to the merits." *Tenet v. Doe*, ___ U.S. ___, ___ n. 4, 125 S.Ct. 1230, 1235 n. 4, 161 L.Ed.2d 82 (2005), *citing Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). However,

> [w]hile *Steel Co.* reasoned that subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues. "[A] court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying *Mansfield* [*C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884)] and *Steel Company.*" It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits. Thus, as the Court observed in *Steel Co.*, district courts do not overstep Article III limits when they decline jurisdiction of state-law claims on discretionary grounds without determining whether those claims fall within their pendent jurisdiction, or abstain under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669, without deciding whether the parties present a case or controversy.

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584-85, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (citations omitted); *see also Kowalski v. Tesmer*, 543 U.S. 125, ___ & n. 2, 125 S.Ct. 564, 567 & n. 2, 160 I Ed.2d 519 (2004) (assuming existence of Article III standing and addressing "alternative threshold question" whether prudential requirements of standing were satisfied).

The difficulty here is that it is unclear whether a Rule 19 issue is the sort of "threshold" question to which a court may directly proceed without first addressing other "threshold" questions. We are unaware of any case discussing how Rule 19 fits within the *Steel Co./Ruhrgas* scheme, and the parties have not briefed the issue. Moreover, it is

not always easy to determine whether a particular issue is the type of "threshold" matter which, if decided adversely to the plaintiff, obviates the need to address other threshold questions. *Compare Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650, 652-54 (5th Cir.2005) (holding that "district court erred in dismissing the case on forum non conveniens grounds without first determining whether it had subject matter jurisdiction") *with Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 497-98 (2d Cir.2002) (holding that court could pass over question of statutory subject matter jurisdiction and "go[] directly to [a] forum non conveniens issue"); *compare also Calderon v. Ashmus*, 523 U.S. 740, 745 & n. 2, 118 S.Ct. 1694, 140 L.Ed.2d 970 (1998) (stating that court "must first address" whether action presented Article III case or controversy before addressing Eleventh Amendment issue) *and Cox v. City of Dallas*, 256 F.3d 281, 303-04 (5th Cir.2001) (stating that Article III standing "must be examined before the Eleventh Amendment") *with Snoeck v. Brussa*, 153 F.3d 984, 988 (9th Cir.1998) ("Because the Eleventh Amendment bar conclusively ends this dispute we need not address the related issue of [Article III] standing which the district court found plaintiffs lacked") *and Pederson v. La. State Univ.*, 213 F.3d 858, 866 (5th Cir.2000) (addressing issues of Article III standing and state sovereign immunity "in no particular order").

Although there is no clear precedent, we conclude that jurisdictional issues should be decided before reaching the Rule 19 issue. This is so because questions of subject matter jurisdiction, "*i.e.*, the courts' statutory or constitutional *power* to adjudicate the case," *Steel Co.*, 523 U.S. at 89, 118 S.Ct. 1003, must generally be decided before the merits. *See Ruhrgas*, 526 U.S. at 577, 119 S.Ct. 1563 ("[A]

federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits"). Thus, we must decide the questions of standing and mootness, both of which "go[] to the Article III jurisdiction of this Court and the courts below," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997), as well as the question whether the TIA barred subject matter jurisdiction. *See Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 825, 117 S.Ct. 1776, 138 L.Ed.2d 34 (1997) ("We have interpreted and applied the Tax Injunction Act as a 'jurisdictional rule' and a 'broad jurisdictional barrier'" (quoting *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 470, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976))). We have also held that "we may not bypass [an Eleventh Amendment] issue in favor of deciding the case on the merits." *Cardenas v. Anzai*, 311 F.3d 929, 934 n. 2 (9th Cir.2002), *citing Cal. Franchise Tax Bd. v. Jackson (In re Jackson)*, 184 F.3d 1046, 1048 (9th Cir.1999). Thus, we will decide certain jurisdictional issues before turning to the Rule 19 question.

III.

"To satisfy Article III's standing requirements, a plaintiff must show (1) she has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868-69 (9th Cir.2002), *quoting Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S.Ct.

693, 145 L.Ed.2d 610 (2000). "Standing is a question of law reviewed de novo." *Id.* at 867.

"A plaintiff has the burden of establishing the elements required for standing, and '[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" *Takhar v. Kessler*, 76 F.3d 995, 1000 (9th Cir.1996), *quoting Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

"As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint. . . . The party invoking the jurisdiction of the court cannot rely on events that unfolded after the filing of the complaint to establish its standing." *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir.2005) (quotation marks and citations omitted); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n. 4, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (stating that "'[t]he existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*'" and rejecting argument that events which occurred after filing "retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset" (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989) (emphasis in *Lujan*))). Thus, we examine whether the Wilburs had standing under the facts extant at the time of filing, when the Compact had not yet been signed.

The complaint alleged anticipated injuries from two types of provisions in the proposed Compact. The first

anticipated injury concerns provisions of the Compact imposing taxes on sales to other tribe members and the second anticipated injury relates to compliance with the regulatory scheme articulated in Wash. Rev.Code § 43.06.455(4), (5), (7). We need not get to the first if we conclude that the Wilburs had standing to seek prospective relief to prevent the regulatory burden. We therefore turn to that issue.

The regulations contemplated by the proposed Compact would cause the Wilburs cognizable economic injury by forcing them to incur additional costs. *See Clark v. City of Lakewood*, 259 F.3d 996, 1007 (9th Cir.2001) ("'The Court routinely recognizes . . . economic injury resulting from governmental actions . . . as sufficient to satisfy the Article III 'injury in fact' requirement'" (quoting *Clinton v. City of New York*, 524 U.S. 417, 432-33, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998))). The district court stated that because the Compact had not been executed, the injury was "likely" not "actual or imminent." However, the Wilburs sought a declaration that the challenged statutes were invalid, an injunction preventing the consummation of any cigarette tax contract pursuant to those statutes, and a declaration that any contract actually executed was invalid. While plaintiffs seeking injunctive and declaratory relief "must show that the feared harm is 'actual or imminent, not conjectural or hypothetical,' '[o]ne does not have to await the consummation of threatened injury' before challenging a statute." *Canatella v. State of California*, 304 F.3d 843, 852 (9th Cir.2002), *quoting Lujan*, 504 U.S. at 560, 112 S.Ct. 2130, *and Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). Nothing in the complaint suggests that, at the time of filing, the Compact's consummation

was not "'*certainly* impending.'" *Lujan*, 504 U.S. at 564 n. 2, 112 S.Ct. 2130, *quoting Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). On the contrary, the complaint alleged that the State and Tribe were in negotiations and that the Compact would be executed "within the near future." At the pleading stage, we accept this allegation as true. *See Takhar*, 76 F.3d at 1000. Thus, the prospect of injury to the Wilburs from the proposed Compact was sufficiently imminent to satisfy the requirement of an injury in fact.

The causation and redressability requirements are also satisfied. True, the Wilburs' injury was partly dependent on the actions of the Tribe, in the sense that the Compact could not be executed without its participation. *See Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 446 (9th Cir.1994) ("[I]t usually is difficult to establish causation and redressibility when a plaintiff's alleged injury depends on the actions of a third party not before the court"). But the opposite is also true: had the State not enacted statutes authorizing cigarette tax contracts and negotiated with the Tribe, the prospect of injury from the proposed Compact would not have materialized. Thus, the Wilburs' injuries are adequately traceable to the State's actions. *See Artichoke Joe's v. Norton*, 216 F.Supp.2d 1084, 1104 (E.D.Cal.2002) (where plaintiffs sued Governor and sought declaration that gaming compacts between state and Indian tribes violated federal law, causation was satisfied because "the Governor approved the compacts that gave rise to the plaintiffs' injuries"), *aff'd*, 353 F.3d 712, 719 n. 9 (9th Cir.2003) (agreeing with district court's standing analysis). Indeed, we have held that causation was satisfied at the pleading stage where the connection between the defendants' conduct and the plaintiff's injury

was more tenuous than that involved here. *See Bernhardt*, 279 F.3d at 869 (where plaintiff alleged that "[a]s a direct result of the [County's policy of settling civil rights actions for a lump sum including attorney fees], plaintiff has been unable to obtain a civil rights lawyer," plaintiff's "pleading adequately established the causation element required for standing").

Redressability likewise is satisfied. "Plaintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision. . . .. [P]laintiffs 'must show only that a favorable decision is *likely* to redress [their injuries], not that a favorable decision *will inevitably* redress [their injuries].'" *Graham v. FEMA*, 149 F.3d 997, 1003 (9th Cir.1998) (citation omitted). The Wilburs' requests for prospective relief, if granted, would have been likely to redress the injury from the anticipated Compact. We hold that the requirements of Article III standing are satisfied.

IV.

The State contends that the case is moot because the Wilburs sought an injunction barring the State from consummating the Compact with the Tribe, and the Compact has now been executed. However, the Wilburs sought not only such an injunction, but also declaratory relief voiding several statutes and any cigarette tax contract executed by the State and Tribe. "[T]he controversy regarding [these requests for relief] is as 'live' now as it was when [the Wilburs] first sought relief." *S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807, 810 (9th Cir.1993). Thus, although the Wilburs' request for an injunction might be moot, this does not prevent us from

considering other requests for relief which are not moot. *See Powell v. McCormack*, 395 U.S. 486, 496 n. 8, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) ("Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has still considered the remaining requests"); *S. Pac. Transp. Co.*, 9 F.3d at 810 (although one claim was moot, court "may address the remaining, live claims").

V.

The district court held that the TIA deprived it of subject matter jurisdiction over the Wilburs' action. We review the district court's dismissal for lack of subject matter jurisdiction, as well as its interpretation of a federal statute, de novo. *See May Trucking Co. v. Oregon Dep't of Transp.*, 388 F.3d 1261, 1265 (9th Cir.2004). The TIA provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341.

In dismissing the action, the district court did *not* conclude that the Wilburs sought to "enjoin, suspend or restrain the assessment, levy or collection" of a tax under Washington law. Rather, the court held that the "anticipated tribal tax arises under state law for purposes of the Tax Injunction Act" because, among other reasons, "[i]n the absence of [the anticipated Compact] Indian retailers selling cigarettes to individuals who are not members of the Tribe could be required to collect state taxes on such

transactions." *See United States v. Baker*, 63 F.3d 1478, 1489 (9th Cir.1995) ("[T]he right of a state to impose and enforce a tax on cigarettes sold by Indians to nontribal members is . . . clearly established").

The district court's focus on the anticipated Tribal tax misses the point. Even accepting the premise that the Wilburs' suit sought to "enjoin, suspend or restrain the assessment, levy or collection" of the Tribal tax (which the Wilburs dispute), the anticipated Tribal tax was not a State tax. If the Tribe imposed a tax independently of any contract with the State and retained the revenues, the TIA would not apply to a suit seeking to "enjoin, suspend or restrain the assessment, levy or collection" of that tax for the obvious reason that the Tribe is not a state. *Cf. Bluebeard's Castle, Inc. v. Gov't of the Virgin Islands*, 321 F.3d 394, 397 & n. 5 (3d Cir.2003) (TIA does not apply to Virgin Islands because it is not a state). We are aware of no authority for the proposition that a tax under Tribal law is transformed into a tax "under state law" simply because the Tribe agrees to enact that law in exchange for a promise by the State not to levy similar taxes. Such an agreement does not alter the fact that the Tribe remains the taxing authority and the sovereign to which tax payments are remitted. Thus, the question is not whether the Wilburs sought to "enjoin, suspend or restrain the assessment, levy or collection" of a *Tribal* tax, but whether they sought to "enjoin, suspend or restrain the assessment, levy or collection" of a *Washington* tax.

We are assisted by the Supreme Court's decision in *Hibbs v. Winn*, 542 U.S. 88, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004). In *Hibbs*, the plaintiffs challenged a state law authorizing certain tax credits, and sought to enjoin the law's operation, on Establishment Clause grounds. *See id.*

at 2281. The Court rejected the position that the TIA "prevent[s] federal-court interference with all aspects of tax administration," *id.* at 2288 (quotation marks omitted), and held that the TIA did not bar the plaintiffs' action "because that action, if successful, 'would result in the state's receiving more funds that could be used for the public benefit.'" *May Trucking*, 388 F.3d at 1267, *quoting Hibbs*, 124 S.Ct. at 2283. Thus, "[a]fter *Hibbs*, the dispositive question in determining whether the Act's jurisdictional bar applies is whether '[f]ederal-court relief ... would have operated to reduce the flow of state tax revenue.'" *Id.*, *quoting Hibbs*, 124 S.Ct. at 2288. Although *Hibbs* had not been decided at the time of the district court's decision, our decision which *Hibbs* affirmed, *Winn v. Killian*, 307 F.3d 1011(9th Cir.2002), had been.

Here, the Wilburs sought a declaration of the invalidity of the statutes governing cigarette tax contracts, an injunction preventing the State from entering into any contract, and a declaration that any agreement actually executed was void. This relief would not have operated to reduce the flow of Washington's tax revenues; instead, it would have *prevented* the State from agreeing *not* to impose a tax. Thus, the district court erroneously dismissed the case on TIA grounds.

The State argues that the TIA applies because the cigarette tax contract scheme "benefits the State by saving the State resources in enforcing collection of the state taxes," and points to a legislative finding that cigarette tax contracts will "enhance enforcement of the state's cigarette tax law, *ultimately saving the state money* and reducing conflict." Wash. Rev.Code § 43.06.450 (emphasis added). Because the Wilburs' action, if successful, might harm the public fisc by depriving the State of the benefits of cigarette

tax contracts, the State submits that it should be barred by the TIA. But the TIA proscribes only those actions which would operate to decrease a state's *tax* revenue, *see May Trucking*, 388 F.3d at 1267, not any lawsuit which might place financial burdens upon the State. Whatever impact the Wilburs' action might have on the State's litigation and enforcement costs, it surely will not reduce the State's tax revenues. Further, the State's prediction about how this action might affect the State's financial bottom line in the future is too speculative to circumvent the holding of *Hibbs*.

Nor do principles of comity bar this lawsuit. The Supreme Court has relied on such principles "to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." *Hibbs*, 124 S.Ct. at 2289 n. 9. The Wilburs seek no such relief.

VI.

The State also argues that the Eleventh Amendment precludes the Wilburs' action, another jurisdictional hurdle we must discuss, even though the district court did not address this argument.

"The Eleventh Amendment bars suits against a state or its agencies, regardless of the relief sought, unless the state unequivocally consents to a waiver of its immunity." *Yakama Indian Nation v. State of Wash. Dep't of Revenue*, 176 F.3d 1241, 1245 (9th Cir.1999). The Wilburs concede that the State has not waived its immunity and that all claims against the state and its agency, the Department of Revenue, must therefore be dismissed.

However, the Wilburs properly contend that the Eleventh Amendment does not bar their claims for declaratory and injunctive relief against the Governor and the Director and Assistant Director of the Department of Revenue. "Since the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 . . . (1908), courts have recognized an exception to the Eleventh Amendment bar for suits for prospective declaratory and injunctive relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law." *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir.2000); *see also Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir.1992) ("[T]he Eleventh Amendment does not bar actions seeking only prospective declaratory or injunctive relief against state officers in their official capacities").

"[I]n determining whether 'the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *ACS of Fairbanks, Inc. v. GCI Communication Corp.*, 321 F.3d 1215, 1216-17 (9th Cir.2003) (Order), *quoting Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002). The complaint alleged that the challenged statutes authorize the state to enter into agreements which violate federal law and, accordingly, sought a declaration that the statutes were invalid, an injunction preventing the state from utilizing the authority granted by those statutes to enter into any agreement, and a declaration that any agreement entered was invalid. The complaint therefore "alleges an ongoing violation of federal law and seeks relief properly characterized

as prospective." *Id.; see also Artichoke Joe's*, 216 F.Supp.2d at 1109-11 (*Ex Parte Young* permitted claim against Governor seeking declaration that gaming compacts between state and Indian tribes violated federal law). Thus, the State of Washington and its Department of Revenue must be dismissed but not the individual government officers.

VII.

With these jurisdictional issues behind us, we can now address the Rule 19 question. In the district court, the State argued that the action should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(7) because the Tribe is an indispensable party pursuant to Rule 19. The district court held that the Tribe was not a necessary party. We generally review for an abuse of discretion the district court's decision regarding joinder, but review de novo any legal conclusions underlying that decision. *See Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir.2004).

Application of Rule 19 involves "three successive inquiries." *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir.2005).

> First, the court must determine whether a nonparty should be joined under Rule 19(a). We and other courts use the term "necessary" to describe those "[p]ersons to [b]e [j]oined if [f]easible." . . .
>
> If an absentee is a necessary party under Rule 19(a), the second stage is for the court to determine whether it is feasible to order that the absentee be joined. . . .

> Finally, if joinder is not feasible, the court must determine at the third stage whether the case can proceed without the absentee, or whether the absentee is an "indispensable party" such that the action must be dismissed . . . . Rule 19 uses "the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors [in Rule 19(b)], it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it."

Id. at 779-80 (citations omitted). We address each of these inquiries in turn.

A.

The State argues that the Tribe is a "necessary" party because the Tribe "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the [Tribe's] absence may . . . as a practical matter impair or impede the [Tribe's] ability to protect that interest." Fed.R.Civ.P. 19(a)(2)(i). In deciding whether Rule 19(a)(2)(i) is satisfied, we "must determine whether the absent party has a *legally protected interest* in the suit," and, if so, whether "that interest will be *impaired or impeded* by the suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir.1990).

The district court, laboring under the mistaken impression that the Compact was still awaiting approval from the Governor, concluded that "[b]ecause the subject of this action does not affect the Tribe's interest in an existing, enforceable agreement, . . . the interest claimed on behalf of the tribe is [not] 'legally protected.'" We need not

determine whether the court correctly held that the Tribe had no "legally protected" interest in this action prior to execution of the Compact, but instead determine whether the Tribe has such an interest now that we are aware that the Compact was in effect at the time of the district court decision. Because Federal Rule of Evidence 201 permits us to "take judicial notice of the records of state [entities] and other undisputed matters of public record," we may take notice of the executed Compact even though it was not in the district court record. *Disabled Rights Action Comm.*, 375 F.3d at 866 n. 1 (taking notice of licensing agreements to which state agency was a party that had not been entered into district court record).

Here, the Wilburs must establish the illegality of the Compact in order to succeed on the merits of any of their claims. Because the Tribe has an interest in retaining the rights granted by the Compact, the requirement of a "legally protected" interest is satisfied. *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1156-57 (9th Cir.2002) (holding that tribe was necessary party under Rule 19(a)(2) where tribe "claim[ed] a legally protected interest in its contract rights with [the defendant]").

In addition, disposition of this action in the Tribe's absence may impair or impede the Tribe's ability to protect its interest. If the Compact is invalidated, the State would be released from its contractual obligation to refrain from taxing cigarette sales by Indian retailers to non-Indians and non-Tribe members. If the State resumed imposing such taxes, the Tribe would be forced to choose between double-taxing its own retailers or foregoing tax revenue for essential government services. Thus, "the instant litigation threatens to impair the [Tribe's] contractual interests,

and . . . its fundamental economic relationship with [the State]." *Id.* at 1157. As we stated in *Dawavendewa*, it is a "fundamental principle" that "a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Id.*; *see also Manybeads v. United States*, 209 F.3d 1164, 1166 (9th Cir.2000) (where plaintiff sought to "undo[ ]" agreements to which tribe was a party, tribe "qualifie[d] as a necessary party under both parts of Rule 19(a)"); *Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir.1996) (where plaintiff's action would affect agreements to which tribes were parties, tribes were necessary pursuant to Rule 19(a)(2)(i)); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1044 (9th Cir.1983) ("[A]ll parties who may be affected by a suit to set aside a contract must be present"); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir.1975) ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable"); 4 James Wm. Moore et al., *Moore's Federal Practice* § 19.06 (3d ed. 2005) ("As a general rule, all parties to a contract will be necessary in an action to set aside the contract").

The Wilburs argue that the Tribe is not necessary because the State can adequately represent its interest. *See Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir.1999) ("As a practical matter, an absent party's ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit"). We have held, however, that absent tribes' interests were not adequately represented by a state in a case similar to this one. In *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015,

1018 (9th Cir.2002), plaintiffs "challenge[d] the legality of the [Arizona] Governor's actions in negotiating new gaming compacts with Indian tribes, or in extending the tribes' existing compacts." We held that the Governor could not adequately represent the absent tribes because, among other reasons, "the State and the tribes have often been adversaries in disputes over gaming, and the State owes no trust duty to the tribes." *Id.* at 1023 n. 5. Here, too, the Wilburs challenge the state's actions in entering into agreements with the Tribe; the Tribe and the state have been adversaries in disputes over the subject of those agreements in the past (indeed, resolution of a "long-standing disagreement" regarding cigarette taxation was one of purposes recited in the Compact's preamble); and the state owes the Tribe no trust duty that might ensure vindication of the Tribe's interest. *Hull* thus requires us to reject the Wilburs' contention.

The Wilburs argue, however, that the state is an adequate representative because the state and the Tribe "have the exact same interest in seeing to it that their contract is not invalidated." This argument assumes too much. Virtually any party to a contract would prefer to see that contract preserved. Under the Wilburs' logic, one seeking to nullify an agreement could simply sue one of the signatories and then argue that the remaining signatories were not necessary because the existing defendant would "adequately represent" their interest in defending the contract. However, the general rule is exactly the opposite: all parties to a contract are necessary in litigation seeking to "decimate" that contract. *See Dawavendewa*, 276 F.3d at 1157. There is no reason to depart from that general rule in this case. We conclude that the State cannot

adequately represent the interests of the Tribe, and thus the Tribe is a necessary party pursuant to Rule 19(a)(2)(i).

B.

We now address whether joinder is feasible. "Federally recognized Indian tribes enjoy sovereign immunity from suit, and may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress." *Id.* at 1159 (citations omitted). The Wilburs offer no persuasive argument that the Tribe's immunity has either been waived or abrogated. Accordingly, joinder is not feasible. *See id.*

C.

We now address "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Fed.R.Civ.P. 19(b). In making this determination, we consider four issues:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

The first three tests point toward dismissal. "[T]he first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a): a protectible interest that will be impaired or impeded by the party's absence." *Hull*, 305 F.3d at 1024-25; *see also Dawavendewa*, 276 F.3d at 1162 ("The prejudice to the Nation stems from the same impairment of legal interests that makes the Nation a necessary party under Rule 19(a)(2)(i)"). If the Compact is invalidated in the Tribe's absence, the Tribe will be prejudiced to a great extent.

As to the second test, it is not possible to lessen or avoid any prejudice by the shaping of relief or protective provisions in the judgment. The Wilburs want nothing less than nullification of the Compact. If they succeed, the Tribe will be deprived of the contractual benefits for which it bargained. Moreover, although the Wilburs stress that the Tribe could have intervened if it wished, "we cannot require the [Tribe] to intervene to minimize the potential prejudice, since intervention would require a waiver of sovereign immunity." *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1102 (9th Cir.1994).

The third test, whether a judgment rendered in the Tribe's absence will be adequate, also "does not favor the plaintiffs," because if the Compact is invalidated, the Tribe's "protectible interests [would be] impaired." *Hull*, 305 F.3d at 1025; *see also Dawavendewa*, 276 F.3d at 1162 (no partial relief adequate when "[a]ny type of injunctive relief necessarily results in . . . prejudice to [absent tribe]"); *Pit River Home*, 30 F.3d at 1102 (adequate judgment not possible when plaintiff's claims could not be addressed without prejudicing absent party).

The fourth test supports proceeding in the Tribe's absence, as it is unclear whether the Wilburs will have an adequate remedy if the action is dismissed. Nonetheless, even assuming the Wilburs have no other forum in which to pursue a remedy, we have "regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Hull*, 305 F.3d at 1025, *citing Dawavendewa*, 276 F.3d at 1162; *see also Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir.1999); *Kescoli*, 101 F.3d at 1311; *Pit River Home*, 30 F.3d at 1102; *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir.1994); *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir.1991); *Verity*, 910 F.2d at 560; *Lomayaktewa*, 520 F.2d at 1326-27. Thus, a balance of the four tests in Rule 19(b) supports dismissal of the action.

Undeterred, the Wilburs contend that this case falls within the "public rights" exception to joinder rules. "Under this exception, even if the [Tribe is a] necessary part[y], [it is] not deemed indispensable and, consequently, dismissal is not warranted." *Kescoli*, 101 F.3d at 1311. In *Kescoli*, we explained that, although "[t]he contours of the public rights exception have not been clearly defined," there are two requirements that must be satisfied before the exception may properly be invoked. *Id.* First, "the litigation must transcend the private interests of the litigants and seek to vindicate a public right." *Id.* Second, "although the litigation may adversely affect the absent parties' interests, the litigation must not 'destroy the legal entitlements of the absent parties.'" *Id.*, *quoting Conner v. Burford*, 848 F.2d 1441, 1459 (9th Cir.1988); *see also Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir.1992) ("[T]he public rights exception to joinder rules is

an acceptable intrusion upon the rights of absent parties only insofar as the adjudication does not destroy the legal entitlements of the absent parties" (quotation marks, alterations and citation omitted)). We need not decide whether the first requirement is satisfied, because the second is not.

The Tribe would lose valuable contractual benefits if the Compact was held invalid. This threat to the Tribe's contractual interests precludes application of the public rights exception. *See Kettle Range Conservation Group v. United States Bureau of Land Mgmt.*, 150 F.3d 1083, 1087 (9th Cir.1998) (where plaintiffs sought rescission of contract pursuant to which land had been transferred to absent private parties, court had "no doubt that an order declaring the executed portion of the land exchange void *ab initio* would 'destroy the legal entitlements of the absent parties'" (citation omitted)); *Kescoli*, 101 F.3d at 1311-12 (public rights exception inapplicable because, among other reasons, rights of absent tribes' members under lease agreements "could be significantly affected" if action proceeded in tribes' absence).

D.

Finally, the Wilburs contend that the First Amendment right to "petition the government for a redress of Grievances," U.S. Const. amend. I, cl. 6, prohibits, or at least weighs against, dismissal of this action for nonjoinder pursuant to Rule 19. In support of this novel argument, the Wilburs cite two sets of cases. First, they rely upon two state court cases suggesting that the lack of an alternative forum prevents dismissal of an action for nonjoinder even where an absent tribe has not waived its

sovereign immunity. *See Panzer v. Doyle*, 271 Wis.2d 295, 680 N.W.2d 666, 682-83 (2004); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047, 1057-59 (2003). These decisions, however, do not apply Federal Rule of Civil Procedure 19 and do not even discuss the Petition Clause. Rather, they apply state law governing joinder of indispensable parties. Unlike state courts applying state law, we are bound by our own decisions interpreting federal Rule 19.

Second, the Wilburs rely on cases stating the general proposition that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983). This does not aid the Wilburs, however, for the right of access to the courts is not absolute. *See Hudson v. Palmer*, 468 U.S. 517, 523, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) ("[T]he constitutional right to petition the Government for redress of their grievances . . . includes a *reasonable* right of access to the courts" (emphasis added)). Moreover, the right must be exercised "within the limits . . . of [the courts'] prescribed procedures." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).

It is important to put this argument in context. Rule 19(b) itself requires consideration of "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder" as one of four tests relevant to the determination whether an action should be dismissed. Fed.R.Civ.P. 19(b). What the Wilburs are arguing, then, is that the Petition Clause requires us to give the lack of an alternative forum more weight in the Rule 19(b) calculus than we have in our prior cases. Although our prior decisions did

not specifically discuss the relevance of the Petition Clause to the Rule 19 analysis, we do not believe our colleagues ignored the obvious constitutional implications of depriving a party of a forum in which to pursue its claims. Our prior cases turn not on a disrespect for a plaintiff's right of access to the courts, but "on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Quileute Indian Tribe*, 18 F.3d at 1461 (quotation marks and citation omitted). The Wilburs' invocation of the Petition Clause does not compel a different result.

Lastly, the Wilburs argue that, if we hold that dismissal pursuant to Rule 19 is proper, we should allow them to amend their complaint to name a Tribal official as a defendant. That issue is not before us because the Wilburs never sought to amend their complaint in the district court and they raise this issue for the first time in their reply brief. *See Ventura Packers, Inc. v. F/V JEANINE KATHLEEN*, 305 F.3d 913, 916 n. 1 (9th Cir.2002) (declining request for leave to amend complaint because it was not made in district court); *Black v. Payne*, 591 F.2d 83, 89 (9th Cir.1979) (denying leave to amend because, among other reasons, request was made for first time in reply brief on appeal). We express no opinion on whether the Tribal official could have been sued and, if so, whether this would have enabled the suit to proceed in the Tribe's absence.

DISMISSAL AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARVIN WILBUR, JR., *et al.*, Plaintiffs, v. GARY LOCKE, *et al.*, Defendants.	Case No. CO3-0873L ORDER GRANTING MOTION TO DISMISS (Filed Oct. 20, 2003)

I. INTRODUCTION

This matter comes before the Court on a motion to dismiss (Dkt. #13) filed by defendants Gary Locke, *et al.* (collectively, "the State"). The State contends that the action against it by Marvin Wilbur, Jr., *et al.* (collectively, "Plaintiffs") should be dismissed on multiple grounds. For the reasons set forth in this Order, the Court grants the State's motion to dismiss.

II. DISCUSSION

A. Background.

Plaintiffs, members of the Swinomish Tribe (the "Tribe"), operate a store that sells cigarettes and other goods on tribal land. Plaintiffs seek an order enjoining the Governor of Washington State from entering into a cigarette tax contract with the Tribe.

(Complaint (Dkt. #1) ¶¶ 34-36). The Washington State Legislature has authorized the Governor to enter into such contracts to permit Indian tribes to charge a tribal cigarette

tax in lieu of all state cigarette taxes and state and local sales and use taxes on the sale of cigarettes on tribal land by Indian retailers. *See* RCW 43.06.455. Indian tribes may retain the taxes for use for "essential government services." RCW 43.06.455(8). The purpose of such cigarette tax contracts is to "provide a means to promote economic development, provide needed revenues for tribal governments and Indian persons, and enhance enforcement of the state's cigarette tax law, ultimately saving the state money and reducing conflict." RCW 43.05.450. The law provides that tribes "may allow an exemption [to the taxes] for sales to tribal members." RCW 43.06.455(3).

B. Failure to Join an Indispensable Party.

Pursuant to Fed. R. Civ. P. 12(b)(7), the State seeks dismissal of this action for Plaintiffs' failure to join a necessary and indispensable party, the Tribe. Determination of this issue requires a two-part analysis. First, the Court must determine whether the Tribe is a "necessary" party pursuant to Fed. R. Civ. P. 19(a). *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458 (9th Cir. 1994). If the Tribe is necessary and cannot be joined, the Court "must determine whether the party is indispensable so that in 'equity and good conscience' the action should be dismissed." *Id.* (quoting *Confederated. Tribes of the Chehalis Indian Reservation v, Lujan,* 928 F.2d 1496, 1498 (9th Cir. 1991)).

Fed. R. Civ. P. 19(a) provides for joinder of a party if any of the following conditions is met:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or

> (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may
>
> (i) as a practical matter impair or impede the person's ability to protect that interest or
>
> (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

The State contends that the Tribe is a necessary party because the Tribe has an interest in the subject of this action and that the disposition of this action in the Tribe's absence may impair or impede the Tribe's ability to protect that interest. Specifically, the State argues that "[t]he Tribe has a direct interest in defending itself and the State's authority to enter into a cigarette tax contract, Without the Tribe's participation, its interest will be impaired." (Motion at 16).

The State represents that the cigarette tax contract between it and the Tribe "has been finalized and is awaiting approval from the Governor." *Id.* at 15 n.5. However, because the contract is "awaiting approval from the Governor," neither the State nor the Tribe is bound by its contents. When a party contends that an absent party is necessary because the absent party "claims an interest relating to the subject of the action," that claimed interest must be "legally protected." *Dawavendewa v. Salt River Project Agric. Improvement Power Dist.*, 276 F.3d 1150, 1155 (9th Cir. 2002). Because the subject of this action does not affect the Tribe's interest in an existing, enforceable

agreement, the Court cannot find that the interest claimed on behalf of the Tribe is "legally protected." *See, e.g., American Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015, 1023 (9th Cir. 2002) (finding that because existing compacts called for automatic renewal if neither party gave termination notice; lawsuit seeking to enjoin Governor from renewing or forming new compacts impaired the legally protected interests of absent tribes); *Clinton v. Babbitt,* 180 F.3d 1081, 1089 (9th Cir. 1999) (finding that suit seeking to enjoin the Secretary of the Interior from approving leases between the Hopi Tribe and certain Navajo Tribe members would impair legally protected interest by prohibiting Hopi Tribe from fulfilling agreement with United States and depriving the Hopi Tribe from substantial compensation pursuant to that agreement); *Pit River Home and Agric. Coop. Ass'n v. United States,* 30 F.3d 1088, 1099 (9th Cir. 1994) (finding that the Pit River Tribal Council was a necessary party because lawsuit would impair the Council's interest in certain property, acquired by virtue of the Secretary of the Interior's designation of the Pit River Tribe as the beneficial owner of the property). In contrast to *American Greyhound,* which afforded absent parties a very generous reading of the term "legally protected interest," here the State cannot reasonably claim that this litigation impairs any of the Tribe's legally protected interests.[1] Because the

[1] For the same reason that the Tribe is not a necessary party to this action, Plaintiffs likely lack standing to challenge the anticipated contract between the Tribe and Washington State. The judicial power of the United States is limited to resolution of "cases" and "controversies." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). The standing requirement demands "at an irreducible constitutional minimum" that the plaintiff have [sic] suffered a "concrete and particularized" injury that is

(Continued on following page)

Tribe is not a necessary party to this litigation, this lawsuit is not subject to dismissal for failure to join a necessary and indispensable party.

C. Tax Injunction Act.

The State argues that the Tax Injunction Act bars this Court from granting an injunction, issuing a declaratory judgment, or granting relief pursuant to 42 U.S.C. § 1983. (Motion at 3-7), That Act provides:

> The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.

28 U.S.C. § 1341. The purpose of the Tax Injunction Act is to prevent federal court interference with the States' assessment and collection of taxes. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981) ("[T]his legislation was first and foremost a vehicle to limit drastically federal court jurisdiction to interfere with so important a local concern as collection of taxes.").

Plaintiffs contend that the Tax Injunction Act does not apply to this matter because "[t]his case is about Washington's Governor forcing the Tribe to impose a *tribal tax*, not

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(1) "actual or imminent," (2) caused by or fairly traceable to the challenged act, and (3) redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Just as the Tribe does not have a legally protected interest at stake in this litigation, Plaintiffs appear not to have suffered an "actual or imminent" injury. Dismissal for lack of standing therefore likely would be appropriate.

a state tax, on Plaintiffs."[2] (Response at 4). In support of this argument, Plaintiffs note that the statute provides that "a cigarette tax contract with a tribe shall provide for

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[2] The Plaintiffs also argue that the State lacks authority to enter into an agreement such as this with the Tribe. *See* Response at 20-21. Although the Court recognizes that the subject matter of agreements between states and tribes may be limited by federal preemption and provisions of the United States Constitution, agreements such as that at issue here are permissible and increasingly common, as recognized recently by Justice O'Connor in a concurring opinion:

> State governments may enter into consensual relationships with tribes, such as contracts for services or shared authority over public resources . . . Some States have formally sanctioned the creation of state-tribal agreements. See, e.g., Mont. Code Ann. § 18-11-101 *et seq.* (1997) (State-Tribal Cooperative Agreements Act); Neb. Rev. Stat, § 13-1502 *et seq.* (1997) (State-Tribal Cooperative Agreements Act); Okla. Stat., Tit. 74, § 1221 (Supp. 2001) (authorizing Governor to enter into cooperative agreements on behalf of the State to address issues of mutual interest). In addition, there are a host of cooperative agreements between tribes and state authorities to share control over tribal lands, to manage public services, and to provide law enforcement. *See, e.g.*, Cal, Health & Safety Code Ann. § 25198.1 *et seq.* (West 1992 and Supp. 2001) (cooperative agreements for hazardous waste management); Cal. Pub. Res. Code Ann. § 44201 *et seq.* (West 1996) (cooperative agreements for solid waste management); Minn. Stat. § 626.90 *et seq.* (Supp. 2001) (authorizing cooperative agreements between state law enforcement and tribal peace officers); Nev. Rev. Stat. § 277.058 (Supp. 1999) (cooperative agreements concerning sites of archeological or historical significance); N.M. Stat. Ann. § 9-11-12.1 (Supp. 2000) (cooperative agreements for tax administration); Ore. Rev. Stat. § 25.075 (1999) (cooperative agreements concerning child support and paternity matters); Wash. Rev. Code § 26.25.010 *et seq.* (1999) (cooperative agreements for child welfare); § 79.60.010 (cooperative agreements among federal, state, and tribal governments for timber and forest management).

Nevada v. Hicks, 533 U.S. 353, 393 (2001) (O'Connor, J, concurring).

a tribal cigarette tax." *Id.* (quoting RCW 43.06.455(3)). However, the statute also provides that such a "tribal cigarette tax" shall be assessed "in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers." RCW 43.06.455(3). The State notes that if the Tribe did not impose the tribal tax in lieu of the state taxes, the Plaintiffs would be required to collect the State's cigarette tax and sales tax from purchasers who are not members of the Tribe. (Response at 3 (citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161 (1980)).

The Washington State Legislature authorized contracts such as that at issue here to "provide a means to promote economic development, provide needed revenues for tribal governments and Indian persons, and enhance enforcement of the state's cigarette tax law, ultimately saving the state money and reducing conflict," RCW 43.05.450. In the absence of such a contract Indian retailers selling cigarettes to individuals who are not members of the Tribe could be required to collect state taxes on such transactions. *Confederated Tribes*, 447 U.S. at 161. For these reasons the Court finds that the anticipated tribal tax arises under state law for purposes of the Tax Injunction Act, and that the Act deprives this Court of jurisdiction over this matter.[3]

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[3] Plaintiffs do not argue that the Tax Injunction Act's requirement that "a plain, speedy, and efficient remedy may be had in the [state] court" is absent here. This element requires "a state-court remedy that meets certain minimal procedural criteria." *Rosewell*, 450 U.S. at 522. Plaintiffs may challenge the legality of the anticipated contract pursuant to the provisions of RCW Chapter 7.24. The Court therefore

(Continued on following page)

III. CONCLUSION

For the foregoing reasons, the Court GRANTS the State's motion to dismiss (Dkt. #13). The Clerk of the Court is directed to enter judgment in favor of the State and against Plaintiffs. The Clerk of the Court is also directed to send copies of this Order to all counsel of record.

DATED this 20th day of October, 2003.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

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finds that "a plain, speedy, and efficient remedy" is available to Plaintiffs in state court.

APPENDIX C

03-CV-00873-M

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARVIN WILBUR JR., et al Plaintiffs, v. GARY LOCKE, et al., Defendants.	NO. CV03-0873 DEFENDANTS' MOTION FOR PROTECTIVE ORDER (STAY OF DEPOSITION) **NOTE FOR MOTION CALENDAR: AUGUST 27, 2003** (Filed Aug. 15, 2003)

COMES NOW, CHRISTINE O. GREGOIRE, Attorney General for the State of Washington and DAVID M. HANKINS, Assistant Attorney General, for the above defendants and hereby moves for the entry of a protective order pursuant to FRCP 26(c), staying the taking of a deposition until after the court has ruled on defendants' FRCP 12(b)(1)(6)(7) dismissal motion. This motion is based on the attached affidavit of counsel, its attachments, plaintiffs' complaint, and the files and records herein.

FACTS & PROCEDURE

Plaintiffs counsel, on August 5, 2003, without prior consultation with defendants' counsel, noted a deposition of Martin Loesch, one of the attorneys who represents the Swinomish Tribe, for September 3, 2003 in La Conner,

Washington. Mr. Loesch was also served with a subpoena duces tecum to produce substantial documentation at that same time.[1] In compliance with FRCP 26(c), see the Affidavit of David Hankins, I conferred with opposing counsel, Robert Kovacevich, requesting that he stay the deposition until I filed my motion to dismiss. He declined. The defendants herein, by motion dated August 14, 2003 have moved for dismissal of the above-entitled action on several grounds. The hearing on defendant's FRCP 12(b) dismissal motion is scheduled for September 12, 2003. The grounds are entirely procedural in that plaintiffs' case is completely lacking in subject matter jurisdiction, failing to name an indispensable party, the Tribe and fails to state a claim upon which relief can be granted.[2] Consequently, neither party needs proof of any additional facts in order for this court to rule on the dismissal motion.

ISSUE

To save time and expense, should the September 3, 2003 deposition of Martin Loesch, a non party deponent, be stayed pending this court's ruling on Defendant's FRCP 12(b)(1)(6)(7) dismissal motion?

DISCUSSION

FRCP 26(c)(1) and (2) allows the court to issue a Protective Order preventing discovery, or only allowing it on certain conditions including time and place. In circumstances where

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[1] See attachment to affidavit of David Hankins.

[2] See Defendants' FRCP 12(b)(1)(6)(7) dismissal motion and accompanying brief on file herein.

"justice" is required " . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . " the court can issue a protective order. The present request is that the court stay Mr. Loesch's deposition pending a ruling on defendants' dismissal motion. If the court grants the defendants' dismissal motion, the plaintiffs' complaint would be dismissed, and no discovery would be allowed. If the motion is denied, the deposition can simply be re-scheduled.

The Tax Injunction Act (TIA) 28 USC § 1341 acts as a limitation on Federal District Court subject matter jurisdiction. Under this statute, generally, lawsuits involving state taxes may not be brought in Federal District Courts.

While an enrolled Indian tribe may maintain a tax action against a state, individual tribal members may not. *Dillon v. Montana,* 634 F. 2d 463 (9th Cir. 1980); *Lac Du Flambeau Band of Lake Chippewa Indians v Zueske,* 145 F. Supp. 2d 969 (W.D. Wis. 2000). Plaintiffs claim to be enrolled members of the Swinomish Tribe, but this is not an action by or on behalf of that tribe. The same procedural circumstances were present in *United States v. County of Nassau,* 188 F.R.D. 187 (1999). In that case the Defendant had requested a stay of discovery pending the outcome of its dismissal motion. That motion, like the one in the instant case, was also based on lack of jurisdiction under the Tax Injunction Act. In *County of Nassau,* the Court found good cause to support the stay of discovery pending the dismissal motion's outcome:

> [3] I find that Nassau County has made an adequate showing of good cause to support the issuance of a stay. First, the issue raised is strictly one of law and does not involve issues relating to

> the "sufficiency" of the allegations. *See Hachette Distribution v. Hudson County News Company. Inc.*, 136 F.R.D. 356, 358 (E.D.N.Y.1991) (Spatt, *J.*). Secondly, the motion, if successful, is dispositive of the entire action. *See Rivera v. Heyman*, 96 CV 4489, U.S.Dist. LEXIS 2003, at *3 (S.D.N.Y. February 27, 1997). Thirdly, while not expressing any opinion as to the outcome of the motion to dismiss, I believe that it raises a substantial issue that may be dispositive of the entire action. Fourth, the issue is one that in all likelihood cannot be cured by an amended pleading. In this regard, I further note that in its opposition papers, the government has not sought leave to replead in the event that the motion is granted. Fifth, there is no showing – or even a claim – of any prejudice by the government in the event that the court were to stay discovery. In this regard, Nassau County has stated that notwithstanding a stay of discovery, it will continue to make any public document available to the government at its request.

Id. at 188.

Here, the circumstances, like in the *County of Nassau,* the defendants have moved to dismiss plaintiffs' Complaint based upon the Tax Injunction Act and the Court granted the parties' motion to stay discovery. Further, the discovery cut-off in the present case is May 2004, and with the dismissal motion calendared for September 12, 2003 there is plenty of time to re-schedule the deposition in the event the motion is denied. There is no prejudice to Plaintiffs, and *both parties* save the time and expense of traveling out-of-town for a deposition that may be likely rendered moot by the results of the FRCP 12(b) motion just a few days after the deposition. Additionally, the State

has moved to dismiss the entire complaint based upon the Eleventh Amendment, failure to name a necessary and indispensable party, the Tribe, and failing to state a claim upon which relief can be granted. All of which would be fatal to plaintiffs' pursuing such complaint in Federal District Court and require dismissal of plaintiffs' action.

CONCLUSION

Defendants request the Court issue a protective order staying the deposition of a non-party deponent, until the Court considers defendants' dispositive motion. The Court's affirmative ruling on behalf of the defendants on any one of these enumerated grounds, extinguishes any need for discovery and saves parties time and expense.

DATED this 14th day of August, 2003.

CHRISTINE O. GREGOIRE
Attorney General

/s/ David M. Hankins
DAVID M. HANKINS,
WSBA No. 19194
Assistant Attorney General
(360) 753-7084

APPENDIX D

THE HONORABLE ROBERT S. LASNIK

03-CV-00873-MEM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARVIN WILBUR JR., et al. **Plaintiffs,** **vs.** **GARY LOCKE, et al.,** **Defendants.**	**No. CV03-0873** **SWINOMISH MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER** **(Filed Aug. 26, 2003)**

This memorandum is filed by the Swinomish Indian Tribal Community (the "Tribe") in support of Defendants' Motion for Protective Order (Stay of Deposition), which has been noted for the August 27, 2003, motion calendar. Although the Tribe is not a party to this action, the Tribe has an interest in the Motion for Protective Order, because Defendants seek to stay the deposition of one of the Tribe's attorneys until Defendants' pending Motion to Dismiss is decided.

I. Background.

In this action the Plaintiffs, individual Swinomish tribal members, seek to have this Court intrude into the government-to-government relationship between the Tribe and the State of Washington. Plaintiffs seek to bar a proposed agreement between the Tribe and State that would prevent the double taxation of cigarettes sold by

Indian retailers within the Swinomish Reservation. Plaintiffs have not named the Tribe as a defendant, despite the fact that the lawsuit directly affects the Tribe's legal interests, because the Tribe's sovereign immunity prevents it from being sued without its consent.

II. Defendants' Motion for Protective Order Should be Granted.

Plaintiffs have noted the deposition of Swinomish Tribal Attorney Martin Loesch for September 3, just nine days prior to the calendar date for Defendants' Motion to Dismiss, and have served a subpoena duces tecum seeking a broad range of tribal records related to the proposed Tribal-State agreement. Defendants' Motion for Protective Order, staying the deposition and subpoena duces tecum until the court rules on Defendants' pending Motion to Dismiss, should be granted for several reasons.

First, contrary to Plaintiffs' implication, the Tribe has not "consented" to the deposition of its attorney. Although the Tribe has not gone to the expense of independently seeking a protective order from this court, it fully supports Defendants' Motion for Protective Order.

Second, although Plaintiffs claim that they do not seek privileged material, in fact several categories of documents described in the subpoena duces tecum include attorney work product and documents covered by attorney-client privilege. For instance, the subpoena seeks from the Tribe's attorney "handwritten notes" and "any other material pertaining to the proposed compact." See attachment to Affidavit of David Hankins. Furthermore, all of the documents sought by Plaintiffs that are not attorney work product or covered by attorney-client privilege are

communications between the Tribe and the State, and could be obtained by Plaintiffs directly from Defendants.

Third, there is a high likelihood that Defendants' pending Motion to Dismiss will be successful. The Tribe is clearly an indispensable party in an action that seeks to bar an agreement to which the Tribe is a party. Furthermore, Plaintiffs lack standing because they are not injured in fact by the proposed Tribal-State agreement. The Tribe exercises its own sovereign powers, independent of any Tribal-State agreement, when it taxes cigarette sales by tribal members on its reservation. The effect of the proposed Tribal-State contract is solely to eliminate State taxation of such sales, thereby preventing double taxation.

III. Conclusion.

For the foregoing reasons, Defendants' Motion for Protective Order should be granted.

RESPECTFULLY SUBMITTED this 26th day of August, 2003.

SWINOMISH INDIAN
TRIBAL COMMUNITY

By: /s/ David A. Bricklin, WSBA 7583
per tc [Illegible] for
James B. Weber, WSBA #9594

Office of Tribal Attorney
Swinomish Indian Tribal Community
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APPENDIX E

03-CV-00873-ORD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARVIN WILBUR JR., *et al.*, Plaintiffs, vs. GARY LOCKE, *et al.*, Defendants.	Case No. C03-0873L PROTECTIVE ORDER

This matter comes before the Court on a motion for protective order (Dkt. #14) filed by Defendants. Having considered the motion, response, reply, and attached declarations, the Court finds that Plaintiffs' deposition of Martin Loesch scheduled for September 3, 2003, should be stayed pending resolution of Defendants' motion to dismiss (Dkt. #13). The Court therefore GRANTS Defendants' motion for protective order. Plaintiffs' notice of deposition of Martin Loesch is SET ASIDE pending the Court's ruling on Defendants' motion to dismiss.

DATED this 28th day of August, 2003.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

APPENDIX F

CIGARETTE TAX CONTRACT

Between

THE SWINOMISH TRIBE

And

THE STATE OF WASHINGTON

PREAMBLE

WHEREAS, the Swinomish Tribe is a federally recognized Indian Tribe, possessed of the full inherent sovereign powers of a government; and

WHEREAS, the state of Washington is a state within the United States of America, possessed of full powers of state government; and

WHEREAS, the body of Federal Indian law and policy recognizes the right and the importance of self-determination for Indian Tribes, the authority of a Tribe to tax certain activities, and the need for economic development in Indian country by Indian Tribes; and

WHEREAS, the state of Washington has committed, through the Centennial Accord and Millennium Agreement, to the political integrity of the federally recognized Indian Tribes within the state of Washington and has formally recognized that the sovereignty of each Tribe provides paramount authority for the Tribe to exist and to govern; and

WHEREAS, the imposition of the State cigarette taxes on Swinomish Indian Tribal Community sales of cigarettes from Tribal retailers to nonmember purchasers has the practical effect of limiting the Tribe's ability to impose

cigarette taxes on such sales for essential Tribal governmental purposes; and

WHEREAS, a long-standing disagreement exists between the Tribe and the State over questions regarding jurisdiction over and the taxation of the sale and distribution of cigarettes; and

WHEREAS, the State and Tribe will benefit from resolution of that disagreement by the change in focus from enforcement and litigation to a focus on the administration of this cigarette tax Contract; and

WHEREAS, the Tribe and State will benefit from resolution of that disagreement by the tax base this Contract will enable, taxation being an essential attribute of sovereignty and a tool of self-sufficiency; and

WHEREAS, the State and Tribe will also benefit by the exercise of the attributes of Tribal sovereignty and from the improved well-being of members of the Tribe that will result from economic development by the Tribe and its members; and

WHEREAS, both the Tribe and the State desire a positive working relationship in matters of mutual interest and disagreements by conducting discussions on a government-to-government basis; and

WHEREAS, the mutual interests of the Swinomish Tribe and the state of Washington brought these two governments together to pursue their common interest; and

WHEREAS, this contract is authorized, on the part of the State, by legislation, including House Bill 5372, enacted by the 2001 Regular Session of the 57th Legislature and signed by the Governor, effective July 22, 2001, and House

Bill 2553, enacted by the 2002 Regular Session of the 57th Legislature and signed by the Governor, effective June 13, 2002, as codified in RCW 43.06.450, RCW 43.06.455, RCW 43.06.460, and RCW 82.24.295; and on the part of the Tribe, by a Tribal Ordinance duly adopted by the Swinomish Indian Community Senate and signed by the Tribal Chair.

NOW THEREFORE, the Tribe by and through the Swinomish Indian Community Senate, and the state of Washington by and through its Governor, do hereby enter into this Contract for the mutual benefit of the Tribe and the State to wit:

PART I
Definitions

1. "Auditor" means the auditor selected pursuant to Part VII of this Contract.

2. "Carton" or "carton of cigarettes" means, unless otherwise indicated, a carton of two hundred (200) cigarettes.

3. "Cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

4. "Contract" means this contract entered into by the state of Washington and the Swinomish Tribe.

5. "Department" means the Washington State Department of Revenue.

6. "Essential government services" means services such as Tribal administration, public facilities, fire, police, public health, education, job services, sewer, water, environmental and land use, transportation, utility services, and economic development.

7. "Indian country," consistent with the meaning given in 18 U.S.C. 1151 means:

   - All land within the limits of the Swinomish Indian Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation; and
   - All Indian allotments or other lands held in trust for a Swinomish Tribal member or the Tribe, or otherwise subject to a restriction against alienation imposed by the United States, the Indian titles to which have not been extinguished, including rights of way running through the same.

8. "Liquor Control Board" means the agency of the state responsible for enforcement of chapter 82.24.RCW pursuant to RCW 82.24.550.

9. "Local retail sales tax" means the combined Washington local retail sales taxes applicable in the area.

10. "NonIndian" means an individual who is neither a Tribal member nor a nonmember Indian.

11. "Nonmember Indian" means an enrolled member of a federally recognized Indian Tribe other than the Swinomish Tribe.

12. "Parties to the agreement" or "parties" mean the Swinomish Tribe and the state of Washington.

13. "Retail selling price" means the ordinary, customary, or usual price paid by the consumer for each package of cigarettes, which price includes the Tribal cigarette tax.

14. "Self-certified tribal wholesaler" means a wholesaler who is a federally recognized Indian Tribe or a member of such a Tribe, who is not required to be licensed under any state law.

15. "Self-certified wholesaler" means an out-of-state wholesaler who is not a self-certified tribal wholesaler.

16. "State" means the state of Washington.

17. "Tobacco products" means cigars, cheroots, stogies, periques, granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco, snuff, snuff flour, cavendish, plug and twist tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking. "Tobacco product" does not include cigarettes.

18. "Tribal cigarette tax" means the tax or taxes enacted as a provision of Tribal law on the units of cigarettes sold and on the purchase of cigarettes by retail buyers.

19. "Tribal member" or "member" means an enrolled member of the Swinomish Tribe.

20. "Tribal retailer" means a cigarette retailer wholly owned by the Swinomish Tribe and located in Indian country or a member-owned smokeshop located in Indian country and licensed by the Tribe.

21. "Tribal tax stamp" means the stamp or stamps that indicate the Swinomish Tribal cigarette tax imposed under this Contract is paid or that identify those cigarettes with respect to which no tax is imposed.

22. "Tribe" or "Tribal" means or refers to the Swinomish Tribe, a federally recognized Tribe.

23. "Swinomish Indian Reservation" or "reservation" means the area recognized as the Swinomish Indian Reservation by the United States Department of the Interior.

24. "Wholesaler" means every person who purchases, sells, or distributes cigarettes for the purpose of resale only.

PART II
Applicability of the Contract

1. Execution of Contract

This Contract shall become effective when approved by the Swinomish Indian Community Senate and signed by the authorized signatory for the Tribe, and signed by the Governor of the state of Washington. This Contract shall be executed in duplicate originals, with each party retaining one fully-executed duplicate original of the Contract.

2. Application

From its execution, and contingent on the imposition of the Tribal cigarette tax pursuant to a Tribal ordinance meeting the terms of Part III of this Contract, this Contract shall apply to the retail sale of cigarettes by Tribal retailers. Sales subject to the Tribal cigarette tax imposed pursuant to this Contract are those in which delivery and physical transfer of possession of the cigarettes from the retail seller to the buyer occurs within Indian country. "Delivery and physical transfer of possession" within Indian country does not include mail order type sales, including internet, catalog, and telephone sales, unless the cigarettes are delivered to the buyer within Indian country.

3. Scope Limited

This Contract does not apply to:

a. Cigarettes sold at retail by nonIndians or non-member Indians; and

b. Tobacco products as that term is defined in Part I of this contract.

PART III
Imposition of Tribal Cigarette Taxes

1. Tribal Retailers

a. The Tribe agrees to notify the Department 30 days prior to the start up of cigarette sales by any Tribal retailer other than a retailer in existence on the effective date of this Contract.

b. The Tribe agrees that any cigarette retailer wholly owned by the Swinomish Tribe is subject to this Contract.

c. The Tribe agrees that it will require any member-owned smokeshop located in Indian country to be in compliance with the terms of this Contract. In addition the Tribe agrees that it will maintain and enforce a requirement that any such member-owned smokeshop obtain a license from the Tribe and that a condition of such license is access of the Department to observe sales pursuant to section 1 of Part IX of this Contract.

d. The Tribe agrees to enact ordinances regarding Auditor access to records of tribal members selling cigarettes in Indian Country.

2. Tax Imposed on Sales by Tribal Retailers

a. The Tribe shall impose by ordinance taxes pursuant to the requirements of this Part on all

sales by Tribal retailers of cigarettes to non-Indian and nonmember Indian purchasers within Indian country. Such ordinance may provide for compensation for wholesalers for their services in affixing the Tribal tax stamp.

b. Beginning no sooner than the date this contract is signed, and subject to enactment of a Tribal ordinance authorizing the imposition of a tax on cigarettes, the Tribe shall impose and maintain in effect a tax on the retail sale of cigarettes equaling no less than the sum of an amount equal to 100 percent of the state cigarette tax, which is expressed in cents per cigarette, plus an amount equal to 100 percent of the state and local retail sales taxes.

c. During the term of this Contract, upon any future increase in the state cigarette tax, state retail sales tax or local retail sales tax, the Tribal tax on cigarettes shall increase by no less than 100 percent of the increase in the combined state and local tax rates.

d. Upon any future decrease in the state cigarette tax, state retail sales tax or local retail sales tax, the Tribal tax on cigarettes may decrease to a minimum of no less than 100 percent of the combined state and local tax rates.

e. Pursuant to RCW 43.06.455, the State retrocedes from its tax during the time this Contract is in effect.

f. The Tribe shall provide advance notice to the Department regarding the date the tribal tax goes into effect.

PART IV
Purchase of Cigarettes by Tribal Retailers

1. Wholesale Purchases – Requirements

   The Tribe agrees to add to Tribal law, and maintain in effect, a requirement that the Tribal retailers purchase cigarettes only from sources authorized pursuant to this Contract.

2. Delivery of Cigarettes to the Tribal Retailer Outside of Indian Country

   Cigarettes bearing the Swinomish Tribe Tribal tax stamp required by this Contract may be delivered or transferred within or outside Indian country by a wholesaler to the Tribe or a Tribal retailer. Such cigarettes must be accompanied by invoices identifying the cigarettes as Swinomish Tribe cigarettes.

PART V
Tribal Tax Stamps

1. Tribal Tax Stamp Required

   a. All cigarettes sold by the Tribal retailer shall bear a Tribal tax stamp.

   b. The Tribe may by ordinance allow for an exemption from the tax imposed under Part III of this Contract for Tribal members. If the Tribe provides for such tax exemption, the following shall apply:

      i. The Tribe agrees that members will be exempted from all or a specified portion of the cigarette tax and sales tax at the point of sale. Such cigarettes shall bear the Tribal tax stamp; however, the non-applicable tax value of the stamp shall be deducted from the selling price at the time of sale. The

books and records of the Tribal retailer must indicate the sales made to members. The Tribe agrees that it will enact an ordinance requiring that eligibility for the exemption is conditioned on members providing documentation substantiating enrolled status. The Tribe agrees that the ordinance will establish a reasonable limit on purchases by Tribal members and shall provide a penalty for violation of the ordinance, the objective being to preclude resales of untaxed cigarettes by members. The State and the Tribe agree that the Tribe may reimburse the Tribal retailer for tax stamps on tax exempt cigarettes purchased by the retailer prior to the start of the Tribal tax.

2. Creation and Supply of Tribal Tax Stamps

The Tribe shall arrange for the creation and supply of a Tribal tax stamp from a nationally recognized stamp manufacturer. Tribal tax stamps will have a serial number or some other discrete identification so that stamps may be traced to the wholesaler.

3. Stamp Vendor Contract

a. The Tribe shall contract with a bank or other stamp vendor to distribute tax stamps. The stamp vendor shall distribute stamps to wholesalers, upon payment of the applicable Tribal cigarette tax by the wholesaler, and remit the collected taxes to the Tribe. The contract shall provide that the stamp vendor shall purchase a supply of Tribal tax stamps from the manufacturer and make them available for purchase. The Tribe may, at its option, select as the stamp vendor the bank with which the Department contracts for that service, or some other third party stamp vendor satisfactory to both the Tribe and

the Department. The Tribe shall require the stamp vendor to remit to the Tribe all revenue collected from the Tribal cigarette tax. The Tribe shall require that the stamp vendor provide to the Tribe and to the Department timely reports detailing the number of Tribal tax stamps sold, and make its records available for auditing by the Tribe and the Department.

b. The Tribe may, at a later date, and as part of its tax administration function, choose to maintain and distribute tax stamps, and be deemed the "stamp vendor" for purposes of this Contract. The Tribe and the State agree that should the Tribe choose to be its own stamp vendor that this shall be addressed in a memorandum of agreement between the Tribe and the Department of Revenue. The memorandum of agreement shall at a minimum address the following:

   i. Verifiable procedures for ordering, receiving, and inventorying tax stamp, including holding stamps in a secure location.

   ii. Distribution of stamps by the Tribe.

   iii. Recordkeeping by the Tribe and its wholesalers.

   iv. Audit protocols and access of the Auditor to stamping records of the Tribe and its wholesalers.

   v. Reporting by the stamp manufacturer.

4. Requirements for Affixation of Stamps by Wholesalers

   a. Wholesalers shall be responsible for affixing the Tribal tax stamps to the smallest container of cigarettes that will be sold or distributed by the Tribal retailer. Stamps shall be affixed so that the stamps may not be removed from the package without

destroying the stamp. Stamps shall be affixed so that it may be readily ascertained by inspection that the tax has been paid.

b. The State agrees that it will refund tax attributable to cigarette tax on those cigarettes that bear the state stamp and that on the effective date of the Tribal cigarette tax are in the inventory of the Tribal retailers. The Tribe agrees to allow the Department access to its inventory and floor stock so that an accounting of taxed cigarettes may be made. The Tribe agrees to provide access of verification to the stock of its member retailers for an inventory of cigarettes on hand when the tax ordinance goes into effect for the purposes of providing refunds of cigarette taxes remitted to the state.

c. The State agrees that the Tribe may continue to purchase cigarettes with the state stamp affixed after the effective date of the Tribal cigarette tax until such time as the Tribe arranges for the use of a Tribal stamp. The State will refund to the Tribe on a monthly basis the tax attributable to such cigarettes, provided that the invoices from the wholesaler to the tribal retailer indicate that the cigarette tax was passed on to the tribal retailer. The Tribe agrees that it will require members to use the state stamp until such time as the Tribal stamp is available for use. The Tribe agrees that it will require the member retailers to provide a regular accounting of such stamps in order to facilitate the refund of tax to the Tribe.

5. Wholesaler Obligation under State Law

Collection of the Tribal cigarette tax (unless prepaid to the stamp vendor by the Tribal retailer), affixing of the Tribal tax stamps, retention and production of records required by state law (in the case of state

licensed wholesalers) and by this Contract and any memorandum of agreement (in the case of self-certified out-of-state or self-certified Tribal wholesalers), and compliance with other requirements in this Contract, shall be deemed to satisfy the state cigarette excise tax obligation of a wholesaler.

6. State Agreement Regarding Compliance with State and Federal Law

As to all transactions that conform with the requirements of this Contract, such transactions do not violate state law, and the State agrees that it will not assert that any such transactions violate state law for the purpose of 18 U.S.C. § 2342 or other federal law specifically based on violation of state cigarette laws.

PART VI
Wholesalers

1. Wholesalers Licensed by the State

Wholesalers licensed by the State are subject to the requirements as set forth in Title 82 RCW and any rules adopted thereunder, and therefore must maintain adequate records detailing which cigarettes are subject to state tax and which cigarettes are subject to the Swinomish Tribe Tribal cigarette tax.

2. Self-Certified Out-of-State Wholesalers – Memorandum of Agreement

The Tribe agrees that it will adopt a policy requiring that it, the Tribe, and any member retailers, will purchase cigarettes for resale only from wholesalers licensed with the state of Washington. If the Tribe chooses to change this policy to allow purchase from out of state wholesalers not licensed with the state of Washington, the Tribe agrees that it will enter into a memorandum of agreement that addresses the following concerns:

a. An assurance that the out-of-state wholesaler can and will meet the terms of this Contract;

b. A means to determine if the out-of-state wholesaler is licensed to do business with the state in which they reside;

c. A requirement that cigarettes transported in the state of Washington be accompanied by invoices; and

d. An agreement by the out-of-state wholesaler that the Auditor have access to its records.

3. Self-Certified Tribal Wholesalers – Memorandum of Agreement

The Tribe agrees that it will adopt a policy requiring that it, the Tribe, and any member retailers, will purchase cigarettes for resale only from wholesalers licensed with the state of Washington. If the Tribe chooses to change this policy to allow purchase from out-of-state wholesalers not licensed with the state of Washington, the Tribe agrees that it will enter into a memorandum of agreement that addresses the following concerns:

a. An assurance that the tribal wholesaler can and will meet the terms of this Contract;

b. A requirement that cigarettes transported in the state of Washington be accompanied by invoices; and

c. A requirement by the Tribal wholesaler that the Auditor have access to its records.

4. Tribe as Own Wholesaler – Memorandum of Agreement

This Contract contemplates that the Swinomish Tribe will, at some future date, act as its own wholesaler. In the event that the Swinomish Tribe decides to act as

its own wholesaler in regards to sales to the Tribal retailers, it agrees to first enter into a memorandum of agreement with the Department regarding this activity. The memorandum of agreement shall reference any applicable requirements of this Contract and contain audit standards that at a minimum meet those set forth in this Contract.

PART VII
Audit Process

The Tribe wishes to provide assurance that all parties to this Contract and persons named in this Contract are in compliance with the spirit and terms of this Contract. The purpose of this Part is to provide a process for regular verification of the requirements of this Contract. The verification process is intended to reconcile data from all sources that make up the stamping, selling, and taxing activities under this Contract.

1. Selection of Auditor

   The Tribe and the State agree that, for the purposes of verifying compliance with this Contract, the Tribe may choose to contract with an independent third party auditor or may choose to use the auditing services of the Department for all or part of the verification requirements of this Part. The Tribe agrees that the third party auditor will be a certified public accountant in good standing.

   a. Independent third party auditor: If the Tribe contracts with an independent third party auditor, the Auditor will be retained by the Tribe and the Tribe shall bear the cost of the auditing services. The Tribe shall be allowed to freely communicate with the Auditor.

b. Department auditor: If the Tribe uses the Department's auditing services, the Tribe agrees to allow the Department access to its books and records for the sole purpose of verifying compliance with this Contract. Department access to records shall be coordinated in advance with the Tribes. The Department of Revenue shall bear all the costs of the auditing services. The Tribe shall be allowed to freely communicate with the Auditor.

2. Audit Protocol

To ensure compliance with this Contract, the Auditor must adhere to the following protocol:

a. Review of records: To verify the requirements of this Contact, the auditor must review at a minimum the records specified below.

i. Tribal retailers: financial statements or purchase invoices relating to purchases of cigarettes from licensed wholesalers or other wholesalers noted under a memorandum of agreement under Part VI, financial statements or sales invoices relating to sales of stamped cigarettes, sales of exempt cigarettes, cigarette inventory, records to verify whether Tribal cigarette and sales taxes were remitted to the Tribe for deposit into Tribal accounts, and records to verify that the retail selling price included the applicable tribal taxes.

ii. Tribe: records such as account records and contract invoices necessary to verify that all Tribal cigarette tax revenue was used to fund essential government services described in Part XII, section 8 of this Contract.

iii. Self-certified out-of-state wholesaler, self-certified Tribal wholesaler, or Tribe as own wholesaler: records noted as subject to audit in a memorandum of agreement under Part VI of this Contract, such audit to be conducted by a third party auditor on behalf of the Tribe.

b. Period under review: To verify the requirements of this Contract, the auditor may review records for all years during the current appropriate audit cycle. Records relating to the period before the effective date of the Tribal cigarette tax are not open to review under this Part.

c. Audit cycle: The audit cycle shall be no more frequently than once every four years, unless otherwise specified below.

i. Initial review: The first required review must cover the period starting on the effective date of the tax and ending September 30, 2004. The Auditor must provide its findings by January 1, 2004.

ii. Use of Tribal cigarette tax revenue: The auditor will review records of the Tribe on an annual basis, consistent with the Tribe's fiscal year, to verify that all Tribal cigarette tax revenue was used to fund essential government services.

3. Format of Auditor Report

The Auditor must submit its findings in final written reports to the Tribe, with a copy to the Department. The report must indicate what types of records were examined for each party audited, what periods were reviewed, and must include a statement regarding verification of the specific requirement listed in sections 4 and 5 of this Part. In addition, if a statistical

sampling process was used, the report must indicate the sampling method used.

4. Tribal Retailers

The Auditor will be responsible for reviewing the records of the Tribal retailer to verify that only stamped cigarettes are sold, that cigarettes are only purchased from licensed wholesalers or from wholesalers specified in agreements under Part VI of this Contract, that exempt sales are not made to nonmembers, that the retail selling price included the applicable Tribal taxes, and that the cigarette and sales taxes are remitted to the Tribe for deposit into Tribal accounts.

5. Essential Government Services

The Auditor will be responsible for reviewing the relevant records of the Tribe to verify that Tribal cigarette tax revenue was used for essential government services in accordance with the requirements of Part XII section 8 of this Contract.

6. Communication between Auditors – Confidentiality

In the event that the Tribe chooses to contract with an independent third party auditor to verify only part of the requirements of this Contract, the Department shall verify the remaining requirements as described above. The independent third party auditor and the Department shall share information as necessary to jointly verify the requirements of this Contract. Information and/or records shared between the auditors are confidential under the provisions of Part XI of this Contract.

7. Dispute Resolution

In the event that either the Tribe or the Department disagrees with the Auditor's final report, either party may notify the other of the disagreement and follow the procedures for resolution of the disagreement in Part VIII of this Contract.

8. Joint Audit Implementation and Review

The Tribe and the State shall meet jointly with the Auditor prior to the beginning of an audit cycle. The purpose of such meeting is to discuss the objectives of the upcoming audit, the expectations of both the Tribe and the State, the audit standards to be used in such audit, and any issues regarding detail of the audit, records pertinent to the review, or substance of the Auditor's report. As soon as possible after the issuance of the Auditor's final report, the Tribe and the State shall meet jointly with the Auditor to review the report and discuss any issues of concern. For the purposes of this Section 8, "audit cycle" refers to the reoccurring scheduled audit of an entity.

PART VIII
Dispute Resolution

The Tribe and the State wish to prevent disagreements and violations whenever possible, and to quickly and effectively resolve disagreements and violations when they arise. The parties agree that, to the extent possible, informal methods shall be used before engaging in the formal processes provided by this Part. The Tribe and the State agree to consult with each other and work together to address issues raised by persons not party to this agreement regarding the implementation of this Contract.

As used in this Part "days" means calendar days, unless otherwise specified.

1. Notification of Violation

If either party believes a violation of the agreement has occurred, it shall notify the other party in writing. The notice shall state the nature of the alleged violation and any proposed corrective action or remedy.

The parties agree to meet within fourteen days of receipt of the notice, unless a different date is agreed to by the parties. The purpose of the meeting will be to attempt to resolve between themselves the issues raised by the notice of possible violation, and provide an opportunity to implement any agreed corrective action.

2. Mediation

If the parties are unable to resolve the disputed issues through joint discussions under section 1 of this Part, either party may request mediation by giving a written mediation demand to the other party. The parties shall first attempt to agree on a mediator. If the parties cannot agree on a mediator within 30 days of written demand, a three person mediation panel shall be used and shall be selected as follows: each party shall select a mediator and the two mediators selected by the parties shall jointly select a third mediator.

The parties shall share equally the costs of mediation.

3. Remedies

Whenever an issue is submitted to mediation under this section, the mediators may recommend corrective action to remedy any violation that has occurred. In no case shall a mediator render an independent recommendation or decision on any issue on which the parties reach agreement. Remedies may include: audit of relevant tribal records, interpretation of Contract terms, changes in reporting, record keeping, enforcement practices, business practices, or similar actions. Remedies shall not include an award of monetary damages or costs of any kind, or the disclosure of any records not specifically subject to disclosure under this Contract.

4. Termination of Contract

If, after no more than eight months from the initial Notice of Violation, the parties are unable to resolve a disagreement regarding an alleged violation and/or the appropriate corrective action using the dispute resolution methods authorized in this section, or if a party continues to violate a Contract term after the completion of the mediation process authorized in this section, this Contract may be terminated. The parties may, after no less than six (6) months following any such termination, enter into a new Contract.

5. Disagreements Regarding Reports of the Auditor

Should either party have a concern about a report from the Auditor, which cannot be resolved through the joint audit review process described in Part VIII of this Contract, that party may choose to resolve the concern through the use of a mediator. Failure of either party to grant the mediator access to any records necessary to review the report is a violation under this Contract. The mediator may use the services of an independent third-party certified public accountant in undertaking such review.

6. Notification of For Cause Termination

Upon forty-five (45) days written notice, either party may terminate the Contract for cause. For the purposes of this section, "for-cause" shall mean only the following violations:

(a) Retail sales of unstamped cigarettes during the effective period of a Tribal cigarette tax;

(b) Failure to submit to mediation as required by this Part IX;

(c) A breach of the confidentiality provisions of Part XII of this Contract; or

(d) Use of tax proceeds in violation of the terms of this Contract.

The Party seeking the termination for cause shall notify the other party and the mediation organization, who shall select a mediator to review the facts upon which the for cause termination notice is based. The party making the allegation must provide a written recitation of the facts with the notice of termination. The responding party has ten days to provide its facts to the mediator. If the mediator determines that the alleged event has not occurred, the Contract is terminated, however the party making the allegation may choose to go through the regular dispute resolution process in regard to the issue.

The parties shall use their best efforts to resolve the dispute within the 45-day notice period. If the parties reach agreement, or the for-cause violation is corrected during the notice period, the Contract shall not be terminated.

7. Notification of Sales to Minors Violation

The Department shall immediately notify the Tribe if an allegation is made that the Tribe has made sales to minors in violation of this Contract. Upon such notification, the Tribe shall take enforcement action according to the provisions of Tribal ordinance. Upon the third or subsequent violation within any rolling one-year period of the sales to minors provisions of this Contract the provisions of section 1 of this Part shall apply.

8. Notice Requirements

For the purposes of this Contract, notice shall be by certified mail, return receipt requested, unless both parties agree in writing to accept notice by facsimile. Notice shall be deemed to be given on the date of actual receipt. Notice shall be given as follows:

To the Department:	Director Department of Revenue P.O. Box 47454 Olympia, WA 98504-7454
To the Tribe:	Chair, Swinomish Tribe P.O. Box 817 La Connor [sic], Washington 98257
With a copy to:	Office of the Tribal Attorney P.O. Box 817 La Conner, Washington 98257

9. Sovereign Immunity

Nothing in this Contract shall be construed as a waiver, in whole or in part, of either party's sovereign immunity.

PART IX
Responsibilities of the Swinomish Tribe, the Department of Revenue, and the Liquor Control Board

1. Swinomish Tribe

The Swinomish Tribe is responsible for both enforcement of the terms of this Contract and administration of the Contract, audit procedures and record keeping, and dispute resolution. The Swinomish Tribe agrees to allow the Department entry into the retail store, the purpose of such entry being limited to (a) visual observation of the retail sales taking place at the store and (b) the purchase of cigarettes by the Department.

2. Liquor Control Board

This agreement does not alter the Liquor Control Board's responsibility under chapter 82.24 RCW.

3. Department of Revenue

The Department is responsible for the enforcement and administration of the Contract, audit procedures and record keeping; and dispute resolution, as well as negotiation of its terms, on behalf of the Governor of the state of Washington.

PART X
Term of this Contract – Amendment

This Contract shall remain in effect no longer than eight years from its effective date, subject to the termination provisions under Part VIII of this Contract. The Contract shall be automatically renewed for successive periods of eight years, unless either party objects in writing at least 30 days prior to the expiration date. Amendments to the Contract shall be considered upon the written request of either party. Disputes regarding requests for amendment of this Contract shall be subject to the dispute resolution process in Part VIII of this Contract.

PART XI
Confidentiality

All information under the terms of this Contract received by the Department or open to Department review is "return or tax information" and is subject to the provisions of RCW 82.32.330, the tax information "secrecy clause." All other information that is subject to review by the Auditor, review by the mediator or certified public accountant, or review by the arbitrator is confidential and shall not be disclosed to anyone, in any forum, for any purpose.

PART XII
Miscellaneous Provisions

1. Tribe Does Not Submit to State Jurisdiction

   By entering into this Contract, the Tribe does not concede that the laws of the state of Washington, including its tax and tax collection provisions, apply to the Tribe, its members or agents regarding activities and conduct within or without Indian country.

2. State Does Not Concede Tribal Immunity

   By entering into this Contract, the State does not concede that the Tribe has any immunity from its tax and tax collection provisions.

3. Contract Does Not Create any Third Party Beneficiaries

   No third party shall have any rights or obligations under this Contract.

4. Land Status

   The Tribe shall provide information regarding the status of land upon which any Tribal retailer is located at least 30 days prior to the startup of any new cigarette sales by such retailer.

5. Tobacco Master Settlement Agreement

   a. This Contract is not intended to impact the State's share of proceeds under the master settlement agreement entered into by the State on November 23, 1998.

   b. The Tribe recognizes the State has an interest regarding nonparticipating manufacturers. The State recognizes the Tribe has an interest in the master settlement agreement. The Tribe agrees to not impede the State's efforts to secure compliance of the nonparticipating manufacturers, and the

Tribe reserves its rights regarding these matters.

c. Nothing in this Contract supercedes or replaces chapter 70.157 RCW.

6. Periodic Review of Contract Status

Appropriate representatives of the Tribe and of the Department shall hold periodic meetings to review the status of this Contract and any issues that have arisen under the Contract.

Those meetings shall be held no less frequently than once every twelve months, but may be held more frequently.

7. Sales to Minors

The Tribe or a Tribal retailer shall not sell or give, or permit to be sold or given, cigarettes to any person under the age of 18 years. The Tribe is responsible for the enforcement of this provision. The Tribe agrees to maintain an ordinance prohibiting sales of cigarettes to persons under the age of 18 years.

8. Essential Government Services

a. Tribal cigarette tax revenue shall be used for essential government services. The Auditors shall certify the use of such revenue under the process set forth in Part VIII of this Contract.

b. Tribal cigarette tax revenue may not be used to subsidize Tribal cigarette and food retailers. "Subsidize" means that proceeds from the Tribal cigarette tax or taxes pursuant to this Contract cannot be expended on the direct business activities of the Tribal retail cigarette business. In addition, where the cigarette business is collocated with a retail food business, the proceeds cannot be expended to support the direct business activities of that business.

i. "Direct business activities" include paying wages, benefits, bonuses, or expenses, related to the maintenance and operation of the retail facility or typically considered to be part of a business's operating expenses and overhead;

ii. "Essential government services" includes, but is not limited to: government services to provide and maintain infrastructure such as sidewalks, roads, and utilities; services such as fire protection and law enforcement; the costs of administering the Tribal cigarette tax stamp program under this Contract, including all deductions and exemptions similar to those available to retailers, wholesalers and others under state law; Tribal administration activities such as tax functions, contracting for health benefits, economic development, natural resources, and the provision of job servic ; distribution of moneys related to trust funds, education, general assistance; such activities as land and building acquisitions, and building development and construction; activities such as child care, youth care, and elder care, the provision of recreation opportunities and services; the provision of spiritual care; and cultural programs.

9. Other Retail Sales within Indian Country by Tribal Members

Under Swinomish Tribal law, only licensed Tribal retailers are permitted to make retail cigarette sales within Indian country. The Tribe agrees to provide through tribal ordinance for suspension or revocation of such license in those instances where after notice is given and opportunity to comply is provided, the

retailer's sale of cigarettes remains out of compliance with the requirements of this Contract.

10. Rule 192 – Application

This Contract is a "cooperative agreement" as that term is used in WAC 458-20-192 (Rule 192).

11. Subsequent State Legislative Enactments

Should the Legislature enact a law that provides more favorable terms for the Swinomish Tribe, the parties shall amend the Contract to reflect such terms.

12. Jurisdiction

This Contract does not expand or limit the jurisdiction of either the Tribe or the State.

13. Severability

If any provision of this Contract or its application to any person or circumstance is held invalid, the remainder of the Contract is not affected.

THUS AGREED THIS 3rd day of October 2003.

SWINOMISH TRIBE OF INDIANS	STATE OF WASHINGTON
By /s/ Brian Cladoosby	By /s/ Gary Locke
Brian Cladoosby, Chair	Gary Locke, Governor